80-1819

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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No.

In the Supreme Court of the United States

October Term, 1980

SWISSVALE AREA SCHOOL DISTRICT, CHURCHILL AREA SCHOOL DISTRICT, TURTLE CREEK AREA SCHOOL DISTRICT, and EDGEWOOD SCHOOL DISTRICT,

Petitioners,

v.

DOROTHY HOOTS, individually and as mother of her children JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRANCE KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH AND ERIC SMITH; on behalf of themselves and all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a United States Court of Appeals has the power to impose a time limitation upon the discretionary functions of a trial judge in a United States District Court by ordering the district court to:

(a) complete all hearings and necessary proceedings on the merits of competing remedial plans in a complex school desegregation case;

(b) decide which school districts may be included within an interdistrict remedy; and

(c) enter an appropriate final order granting plaintiffs relief, such relief to be effective and implemented by fall of 1981

all *within 90 days* of the issuance of the mandate.

2. Whether an order which denied without prejudice a motion presented in the midst of testimony and asking for the immediate rejection of a remedial plan for desegregation then being considered and further demanding the immediate implementation (within 30 days) of another remedial plan about which no testimony had been received, is an appealable order within the meaning of 28 U.S.C. §1292(a)(1).

LIST OF PARTIES

Other parties to the proceeding below in the United States Court of Appeals but not listed in this caption are: Commonwealth of Pennsylvania; Edward X. Hallenberg, President of the Allegheny County Board of School Directors; the Allegheny County Board of School Directors; W. Deming Lewis, Chairman of the Pennsylvania State Board of Education; Michael Sullivan, President of the School District of the Borough of Braddock; the School District of the Borough of Braddock; Andrew Lisyak, President of the School Board of the School District of the Borough of Rankin; the School District of the Borough of Rankin; Leo Campbell, President of the School Board of the School District of the Borough of North Braddock; and the School District of the Borough of North Braddock; the Allegheny Intermediate Board of School Directors and Edward X. Hallenberg, as President of the Allegheny Intermediate Board of School Directors, defendants in the district court and respondents below.

In addition to petitioners, by order of court dated May 16, 1979, the East Allegheny School District, Gateway School District, Steel Valley School District and West Mifflin School District were joined by the district court for remedial purposes and were respondents below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	3
STATUTE INVOLVED	3
STATEMENT OF CASE	3
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	19

TABLE OF AUTHORITIES

CASES

Page

Anderson v. Dougherty County Board of Education, 609 F.2d 255 (5th Cir. 1980) 11, 12

Appeals of the School Districts of the Boroughs of Rankin, Braddock and North Braddock, SA 544, 556, and 559 of 1969 (Court of Common Pleas of Allegheny County, Pennsylvania, June 1, 1970) (Opinion) 4

Appeals of the School District of the Boroughs of Rankin, Braddock and North Braddock, (Pennsylvania State Board of Education, June 23, 1969) (Adjudication) 4

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1948)..... 16, 17

Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978).....17

Hoots v. Commonwealth of Pennsylvania, No. 71-538 (W.D. Pa.) 5, 7, 8, 14, 16, 18

Hoots v. Commonwealth of Pennsylvania, 334 F.Supp. 820 (W.D. Pa. 1971) (Hoots I)..... 2

Hoots v. Commonwealth of Pennsylvania, 359 F.Supp. 807 (W.D. Pa. 1973) (Hoots II) 2, 4, 5

Hoots v. Commonwealth of Pennsylvania, 495 F.2d 1095 (3d Cir.), *cert. denied* 419 U.S. 884 (1974) (Hoots III) 2

Hoots v. Commonwealth of Pennsylvania, 587 F.2d 1340 (3d Cir. 1978) (Hoots IV) 2

Hoots v. Commonwealth of Pennsylvania, No. 80- 2116 (3d Cir. 1981) (Hoots V) 8, 9, 10, 11, 12, 13, 17

Page

Hoots v. Weber, No. 80-2124 (3d Cir. 1980) 6, 8
Hoots v. Weber, No. 79-1474 (3d Cir. 1979) 6
Stateside Machinery Company, Ltd. v. Alperin, 526 F.2d 480 (3d Cir. 1975) 16
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 12
Western Geophysical Co. v. Bolt Associates, Inc., 463 F.2d 101 (2nd Cir.) *cert. denied*, 409 U.S. 1040 (1972) 16

STATUTES

28 U.S.C. §1292(a)(1) ..... i, 3, 16, 17
28 U.S.C. §1254(1) 3
42 U.S.C. §1981 3
42 U.S.C. §1983 3

In the
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No.

SWISSVALE AREA SCHOOL DISTRICT, CHURCHILL AREA SCHOOL DISTRICT, TURTLE CREEK AREA SCHOOL DISTRICT, and EDGEWOOD SCHOOL DISTRICT,

Petitioners,

v.

DOROTHY HOOTS, individually and as mother of her children JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRANCE KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Swissvale Area School District, Turtle Creek Area School District, Churchill Area School District, and Edgewood School District, the petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this matter on January 26, 1981.

OPINIONS BELOW

The opinions of the courts below directly preceding this petition[1] are as follows:

1. July 30, 1980, Order of United States District Court for the Western District of Pennsylvania; unreported (App. ii).

2. Opinion and Order by three member panel of United States Court of Appeals for the Third Circuit filed January 26, 1981 not yet reported, but reprinted in Appendix as follows:

   (a) Opinion for the Court by Judge Hunter, (App. 3a).

   (b) Concurring Opinion of Judge Higginbotham, (App. 17a).

   (c) Dissenting Opinion of Judge Garth, (App. 32a).

   (d) Opinion and Order to Amend Dissenting Opinion dated February 26, 1981 by Judge Garth, (App. 56a).

3. Order of United States Court of Appeals for Third Circuit dated February 25, 1981 (denying Petition for Rehearing), unpublished (App. 53a).

4. Order of March 5, 1981, of United States District Court for Western District of Pennsylvania; unreported (App. 58a).

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[1] This case has been the subject of four previously published opinions, reported as: *Hoots v. Commonwealth of Pennsylvania,* 334 F.Supp. 820 (W.D. Pa. 1971) (*Hoots I)* (denying defendants' motion to dismiss); *Hoots v. Commonwealth of Pennsylvania,* 359 F.Supp. 807 (W.D. Pa. 1973) *(Hoots II)* (finding *de jure* discrimination in the creation of the General Braddock Area School District); *Hoots v. Commonwealth of Pennsylvania,* 495 F.2d 1095 (3d Cir.), *cert. denied* 419 U.S. 884 (1974) *(Hoots III)* (dismissal of appeals from district court's denial of petitions to intervene); and *Hoots v. Commonwealth of Pennsylvania,* 587 F.2d 1340 (3d Cir. 1978) *(Hoots IV)* (dismissing appeal from district court's order rejecting remedial plan.)

5. Order of March 24, 1981, of United States District Court for Western District of Pennsylvania; unreported (denying motion to alter or amend order of March 5, 1981) (App. 74a).

6. Memorandum Order of April 6, 1981 of United States District Court; unreported (App. 75a).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit (App. ii) was entered on January 26, 1981. A timely petition for rehearing was denied February 25, 1981 (App. 53a). The jurisdiction of the Supreme Court is involved pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

The question of jurisdiction set forth in paragraph two above, involves 28 U.S.C. §1292(a)(1) which provides as follows:

> "(a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, ... or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

A. History

This is a school desegregation case brought pursuant to 42 U.S.C. §1981 and 42 U.S.C. §1983 by a few parents of children attending the public schools in the General Braddock Area School District (hereinafter GBASD) in Allegheny County, Pennsylvania. The original complaint, filed June 9, 1971, in the

United States District Court for the Western District of Pennsylvania, alleged that the adoption of a reorganization plan for school districts in Allegheny County has resulted in the creation of a racially segregated school district, namely, the GBASD.

The GBASD is presently a small district of approximately 2,000 students which, prior to the institution of this action, was served by the three independent school districts of the Boroughs of Rankin, Braddock and North Braddock. In 1968 a Pennsylvania statute compelled the County Board of Education to reorganize and consolidate certain constituent school districts in an effort to and solely for the purpose of providing a more comprehensive system of education through the formulation of larger school districts. After much deliberation, on May 9, 1969, the State Board of Education approved and the Court of Common Pleas of Allegheny County upheld a plan which created the GBASD by consolidation of the three borough school districts and the new district came into being July 1, 1971.[2]

As a result of testimony received at a non-jury trial in December, 1972, the United States District Court, in an Opinion and Order filed May 15, 1973,[3] concluded that the defendants intentionally and knowlingly consolidated the Braddock, North Braddock and Rankin School Districts in such a manner as to create a racially segregated school district in violation of the plaintiffs' 14th Amendment rights. Conse-

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[2]See State Board of Education Adjudication, *Appeals of the School Districts of the Boroughs of Rankin, Braddock and North Braddock* (June 23, 1969) App. 79a and *Appeals of the School Districts of the Boroughs of Rankin, Braddock and North Braddock*, SA 544, 556 and 559 of 1969 (Court of Common Pleas of Allegheny County, Pennsylvania, June 1, 1970) (Opinion) App. 83a.

A more detailed account of the formulation of the General Braddock Area School District may be found in *Hoots II*, 359 F. Supp. 807.

[3]*Id.*

quently, the Commonwealth of Pennsylvania State Board of Education was directed to prepare and submit a comprehensive plan of school desegregation for the GBASD which would be both "educationally sound" and "taking into account the practicalities of the situation". [4]

From 1973 through the present, the district court has held numerous hearings, received lengthy testimony and considered a wide range of remedial proposals.[5] However, none of these proposals have yet been found to satisfactorily eliminate the effects of the allegedly *de jure* acts of segregation and still achieve quality education.

In addition, in the past 7½ years, this litigation has been the subject of several appeals to the United States Court of Appeals for the Third Circuit,[6] two applications for Writ of

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[4] *Id.* at 824-25.

[5] After the collection of data and consideration of various remedial concepts, the first proposed remedial plan was submitted to the district court for approval in September, 1973. Known as "22-W", the plan called for the dissolution of the GBASD and the creation of two new school districts by combination with other surrounding districts. The school districts affected by Plan 22-W, including the petitioners herein were invited to intervene for the *limited* purpose of presenting arguments on the merits of the plan. After extensive hearings, Plan 22-W was formally rejected by the court May 7, 1975. *Hoots v. Commonwealth of Pennsylvania*, No. 71-538 (W.D. Pa., May 7, 1975) (Memorandum and Order).

In September, 1975, a new plan known as "Plan A" was submitted to the court. While Plan A again contemplated the destruction of the GBASD, the plan suggested a more moderate realignment of the GBASD with the surrounding districts. After lengthy testimony, the district court denied approval of Plan A, Nov. 18, 1977. *Hoots v. Commonwealth of Pennsylvania*, No. 71-538 (W.D. Pa., Nov. 18, 1977) (Memorandum and Order).

In addition, as discussed at page 13, *infra*, the district court presently has before it three additional proposals. A "Student Tuition Plan", an "Upgrade Plan" which combines a magnet school concept with mandatory co-mingling of students in surrounding districts, and a consolidation proposal suggesting the merger of GBASD with the petitioners herein.

[6] See, *Supra* note 1, at 2.

Mandamus,[7] and various appeals in the Courts of the Commonwealth of Pennsylvania. Further, the district court has had to concern itself with numerous motions, arguments and briefs raising, among other issues, complex questions regarding the joinder of necessary parties and the joinder of parties for remedial purposes only.

B. Proceedings Giving Rise to this Petition

On February 6, 1979, in an effort to find an appropriate solution and bring this protracted litigation to a successful conclusion, the district court encouraged all counsel to submit a satisfactory desegregation plan which might be acceptable to the plaintiffs, the court and the majority of the school districts which had been joined for remedial purposes.

Although plaintiffs' counsel did not propose any concrete or comprehensive plan in response to this invitation, at this unrecorded conference *"plaintiffs' counsel* provided the Trial Judge and those present with data he had collected which, *inter alia,* detailed with considerable accuracy the size and scope of a very limited plan of interdistrict desegregation (a tuition plan for secondary pupils) which he had been authorized to discuss with the Trial Judge and those present."[8] As a result of plaintiffs' favorable attitude toward a limited tuition plan[9] as well as the observation that such a plan would not only be workable but would enable all students of the GBASD system to achieve

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[7] *Hoots v. Weber,* No. 80-2124 (3d Cir. Sept. 9, 1980); *Hoots v. Weber,* No. 79-1474 (3d Cir. May 2, 1979).

[8] Application for Mandamus, *Hoots v. Weber,* No. 79-1474 (3d Cir. 1979) p. 7.

The Tuition Plan, as outlined by plaintiffs' counsel, called for the closing of the GBASD secondary schools and the tuitioning of those students to eight surrounding districts.

[9] It was counsel for Petitioners belief that the suggestion that the Tuition Plan be limited to secondary students was an implied acceptance by the plaintiffs of a neighborhood school concept for elementary students.

a quality education free from the effects of the segregation pattern now existing, the district court directed the Commonwealth to secure all necessary data to formulate such a plan.

In May of 1980, the final "Student Tuition Plan for the General Braddock Area School District" was submitted to the court.[10] In addition, on May 23, 1980, the defendant Commonwealth of Pennsylvania offered to the court an alternative "Metropolitan Desegration Plan for the General Braddock Area School District" which suggested the merger of General Braddock with the school districts of Swissvale, Edgewood and Turtle Creek. Although the merger plan had not been requested by the court, the plan was submitted solely to give the court an idea of an available alternative to the Tuition Plan. It was submitted merely "because it was an easy thing to do, without really making judgments on whether it was a viable alternative".[11]

Hearings on the merits of the Tuition Plan were held commencing July 14, 1980 and concluding August 27, 1980 (despite plaintiffs' intervening appeal of August 4, 1980).[12] In direct contrast to their prior submission and espousement of the Tuition Plan for the previous 1½ years, however, the plaintiffs suddenly opposed the Tuition Plan throughout the July-August 1980 hearings and attempted to direct their testimony toward the debasement of the Tuition Plan.[13] In addi-

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[10]On Sept. 12, 1979, the Commonwealth filed a document setting forth an outline of a nine-district Tuition Plan and in April of 1980, an interim report of the plan was produced. The final plan was submitted on May 15, 1980 and supplemented on May 23, 1980.

[11]July 18, 1980, Transcript, *Hoots v. Commonwealth of Pennsylvania*, No. 71-538 (W.D. Pa.) p. 4.

[12]See, *infra* at 8.

[13]Counsel for Petitioners believe this abrupt change of position by the plaintiffs, occurring relatively simultaneously with the appearance of new counsel has raised a serious question as to the adequacy of representation of the class interests.

tion, the plaintiffs continually attempted to present testimony favorable to merger or consolidation relief despite the trial court's admonishments to restrict all testimony to the merits of only the Tuition Plan.[14]

Then on July 24 and July 30, 1980, upon conclusion of their own testimony but prior to the hearing of any testimony by the affected school districts, the plaintiffs asked the trial court to summarily reject the Tuition Plan in the midst of testimony and to grant an injunction ordering immediate inter-district consolidation relief about which no testimony had been received. The trial judge denied these motions without prejudice to their renewal at the conclusion of the hearings on the Tuition Plan.

Upon denial of the July 24 and July 30, 1980 motions, on August 4, 1980, plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit and on August 11, 1980, plaintiffs further filed an Application for Writ of Mandamus challenging the trial court's delay in the implementation of the requested relief. Said Application was denied by the court September 9, 1980.[15]

By opinion and order of January 26, 1981, the court of appeals, while expressing no disagreement with the trial court's July 24 and July 30, 1980 rulings, accepted jurisdiction of plaintiffs' appeal and ordered the district court to:

"1) complete all hearings and necessary proceedings on the merits of the competing remedial plans for the desegregation of GBASD;

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[14]See *Hoots v. Commonwealth of Pennsylvania,* No. 80-2116 (3d Cir. Jan. 26, 1981) *(Hoots V)* (App. 9a n.15).

Although the hearings were not intended to test the merits of any merger plan (including the Metropolitan Plan), on July 18, 1980, the plaintiffs' own expert witness (in an effort to destroy the Tuition Plan about which he was testifying) stated that the Metropolitan or similar merger plan would be defective. July 18, 1980, Transcript, *Hoots v. Commonwealth of Pennsylvania,* No. 71-538 (W.D. Pa.) p. 250.

[15]*Hoots v. Weber,* No. 80-2124 (3d Cir. Sept. 9, 1980).

2) decide the *Milliken v. Bradley* issue of which school districts may be included within an interdistrict remedy; and

3) enter an appropriate final order granting appellants the relief to which they are entitled under the district court's order of May 15, 1973, such relief to be effective and implemented by the beginning of the first semester of the school year in the fall of 1981."

all within 90 days of the issuance of the mandate on January 26, 1981.[16]

Believing that the three member panel acted improperly and without legal authority in imposing such a mandate, Petitioners herein filed a timely Petition for Rehearing with the court below challenging both that court's jurisdiction and the authority of a court of appeals to impose the 90-day limitation. Said Petition for Rehearing was denied by order of court on February 25, 1981.[17] Hence, this Petition.

REASONS FOR GRANTING THE WRIT

I

Certiorari should be granted to resolve a question of exceptional importance to the federal judiciary which calls for the exercise of this court's supervisory powers, to-wit, the power of a United States Court of Appeals to impose a time limitation upon a district court in its taking of evidence, consideration of issues, and determination of relief.

The prime reason for granting certiorari in this case is to finally test the unprecedented interference by a circuit court upon the discretionary functions of a trial judge and the consti-

[16] *Hoots V* (App. at 16a).

[17] *Hoots V*, (3d Cir. Feb. 25, 1981) (order denying petition for rehearing) (App. 53a).

tutional rights of litigants by imposing a deadline within which all evidence must be concluded, all issues finally determined and relief granted. While the circuit court seizes upon an historically lengthy desegregation case in apparent justification for its mandate, it does so without recognition that precedent is being set for all other cases which are now or will be before the federal judiciary. As Judge Garth clearly points out in his dissenting opinion, the imposition of *any* deadline within which a district judge must perform his judicial functions necessarily carries with it "the seeds of great mischief and potential disruption."[18]

Upon review of the circuit court's opinion,[19] it clearly cannot go unheeded that the court of appeals has failed in its attempt to establish any proper legal precedent or authority in support of its mandate. In the first instance, nowhere does our Constitution or statutory law give the circuit court the power to command a trial judge to deal with evidentiary and discretionary matters within a specific time frame. To the contrary, the exercise of such power is not only improvident and inadvisable, but constitutionally impermissible. Such action will necessarily encourage district judges throughout the United States to limit or preclude the hearing of all relevant evidence thereby taking away from all party litigants their right to determine the best presentation of their case and further forcing the trial judge to make hasty, ill-advised and arbitrary decisions, all in violation of the litigants' constitutional rights to due process, a fair trial, and equal protection.

The circuit court distorts the constitutional, legal and practical implications of its mandate upon *all* litigants by focusing its concern solely upon the 9½ year history of this case throughout which innocent plaintiffs have been "begging for

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[18] *Hoots V* (App. at 35a).

[19] *Hoots V* (App. at 1a).

judicial relief."[20] However, would the court of appeals also require a jury of 12 men and women to assimilate all evidence in a complex criminal or personal injury case and reach an appropriate yet constitutional verdict within 90 minutes merely because the victim has "waited patiently at the courthouse door . . . without an ounce of relief?"[21] Surely the rights of the accused, whether it be a criminal defendant facing a potential loss of liberty or school districts attempting desegregation with quality education, can be of no less concern.

Certainly, no one is enthralled by the fact that over 9 years have passed and thousands of taxpayers' dollars have been spent by all municipalities to assure that all relevant evidence is before the court so that a proper and ultimate conclusion can be reached which will not only attain desegregation but also quality education. Yet, by imposing a time limitation, the circuit court is now prepared to discard nine years of progress, ignore the complicated evidentiary and legal issues which still remain, and force the implementation of an ill-advised, ill-considered and unconstitutional remedy to the irreparable injury of *all* persons involved. The circuit court's action, therefore, requires that this court, through the granting of this Petition, exercise its supervisory powers to prevent further intrusions upon the independence of the district court as the ultimate fact finder and protector of *all* litigants' rights.

In addition, although the majority would like to call our attention primarily to *Anderson v. Dougherty County Board of Education,* 609 F.2d 255 (5th Cir. 1980) in an attempt to justify its intrusion, the *Anderson* case (as well as all others cited in the majority and concurring opinions) is not only easily distinguishable but its extraordinary factual situation serves to impose an even greater burden for justification of the time

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[20] *Hoots V* (App. at 21a).

[21] *Hoots V* (App. at 23a).

limitation, to-wit, dilatory tactics on the part of the trial judge.[22] Unlike *Anderson,* we are not dealing here with a duel system. Nor is this a situation wherein the trial judge had purposefully or negligently delayed the implementation of an effective desegregation plan in accordance with this court's prior mandate. On the contrary, the trial judge here has "valiantly and ably wrestled with the complex issues of this case,"[23] as he has attempted to assist in devising a plan of quality education and desegregation which will be both workable and viable.[24]

The devastating effects this precedent-setting mandate will have on the federal judiciary, and the rights of its litigants, is not merely a whimsical prediction on the part of petitioners. For even as of the time of this writing, the "seeds of great mischief and potential disruption" have been planted. More specifically, while recognizing that the duty of formulating a realistic, practical and effective remedy rests with the district court,[25] the circuit court nevertheless insists that under no

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[22]In *Anderson,* the U.S. District Court for the Middle District of Georgia had been faced since 1963 with the desegregation of one *duel* system in Dougherty County, Georgia. In 1972 the 5th Circuit Court of Appeals held that the desegregation plan then in operation did not comply with this Court's mandate in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), and the case was remanded to the district court to adopt a new remedy. Although new attendance zones were implemented at the secondary level, from 1972 to 1980, the district court failed to order a plan extending to the elementary level and *failed to explain why* (except to refer to opposition to desegregation in the community). As a result of the dilatory tactic, a 60-day mandate issued.

[23]*Hoots V* (App. at 16a n.25).

[24]In addition, it is important to recognize that plaintiffs, themselves, have greatly contributed to the lengthy history of litigation by at least two improvident and time consuming appeals as well as plaintiffs' abrupt change of position regarding the Tuition Plan after many months of its espousement.

[25]*Hoots V* (App. at 14a).

circumstances should the 1981 school year begin without a remedial plan in place.[26] Such an unrealistic belief can only be based upon a total misapprehension of the complexity of facts.

When the circuit court's mandate finally issued on January 26, 1981,[27] the district court had before it three remedial concepts:

(a) A "Tuition Plan" about which the court had received detailed testimony but which required further examination and refinements before implementation. For example, during the July-August, 1980 hearings, plaintiffs sought to point out that the Tuition Plan should not be limited to secondary students, while others indicated that the neighborhood school concept for elementary students would be acceptable;

(b) A four or five district merger plan about which there had been no finalized or detailed proposal presented to the court, nor had any direct evidence been received by the court; and

(c) An "Upgrade Plan" consisting of a magnet program combined with limited but mandatory comingling of students in surrounding districts. As with the merger proposal, the district court had received no finalized or detailed statement of the plan nor had it taken any evidence on the plan.

In addition, since the institution of the mandate, the plaintiffs themselves have proceeded with investigation, collection of data and the formulation of an additional new proposal known as the "HGH Associates Plan of Consolidation." Having not been submitted to the court until March 26, 1981, the plan at this writing remains totally untested and unsupported

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[26] *Hoots V* (App. at 16a).

[27] While only having to deal with a question of jurisdiction and the propriety of the trial judge's denial of immediate injunctive relief, 84 days had passed since the hearing of plaintiffs' appeal before a decision was rendered by the circuit court.

by evidence. Thus, with the refinement of one plan still to be considered, plus the final formalization of and taking of evidence on the other proposals, the district court, in attempting to meet the 90 day deadline, has no alternative but to limit the taking of evidence and to decide upon the limited information it has before it in violation of constitutional mandates.

The dilemma which has been thrust upon the trial judge can be no more clearly exemplified than by a review of the district court's recent order of April 6, 1981,[28] where "*in view of the requirement of immediate relief,*"[29] the district court is prepared to ignore constitutional mandates and

(a) summarily dismiss the upgrade plan without the taking of evidence and without even the consideration of the fully developed plan;[30]

(b) adopt the plaintiffs' HGH proposal without the hearing of any material evidence as to pupil assignment, transportation, utilization of quality facilities or other matters of implementation necessary for the proper determination of whether the remedial proposal would be effective, workable and viable;

(c) impermissibly preclude every litigant's right to full cross-examination of plaintiffs' witnesses; and

(d) unconstitutionally deny petitioners and others their right to a fair trial, due process of law and equal protection under the law by impermissibly limiting each to the presentation of only one witness.

Under these circumstances, the implementation of any such remedy without due regard for not only constitutional

[28] *Hoots v. Commonwealth of Pennsylvania*, No. 71-538 (W.D. Pa. April 6, 1981) (Memorandum Order) App. 75a.

[29] *Id.*, at 77a. (Emphasis supplied).

[30] The trial judge was fully apprised at a status conference of April 1, 1981 that additional work was in progress to make the plan acceptable in meeting the goals of desegregation and quality education.

considerations but also practical considerations of implementation, effectiveness of implementation, effectiveness in desegregation and quality of education, will result in irreparable injury to not only the petitioners herein, but also to the plaintiffs, parents and children, employees and taxpayers of all affected school districts.

In sum, a precedent has been set which can effectively lead to the complete abandonment of judicial responsibility in all federal courts. Time limitations imposed upon the orderly taking of evidence, consideration of issues and determination of relief as a result of the circuit court's unwarranted mandate, can only serve to encourage trial judges to make arbitrary, capricious and unconstitutional decisions (as has this trial judge) necessarily resulting in a cascade of appeals and further delay in the administration of justice.

II

Certiorari should be granted to resolve a conflicting question of law and thereby secure and maintain uniformity of decision among this Court and the circuit courts of appeals.

As previously outlined in the Statement of the Case,[31] the appeal out of which this Petition for Certiorari arises first came before the United States Court of Appeals for the Third Circuit upon a denial of respondents' motion for injunctive relief. On July 24, and again July 30, 1980, upon conclusion of their own testimony but prior to the hearing of any testimony by other litigants, the respondents herein requested the trial judge to summarily reject without further testimony the desegregation plan then being considered and further demanded the immediate implementation (within 31 days) of another proposal about which no formalized plan had yet been prepared, nor any testimony received. The trial judge denied the motion summarily, but *without prejudice* to renew it at the conclusion

[31] *Supra* at 3.

of evidentiary hearings.[32] By accepting jurisdiction of that appeal as a "denial of an injunction" in accordance with 28 U.S.C. §1292(a)(1), the court of appeals has totally misapprehended and overlooked the established legal precepts of this Court.

Section 1292(a)(1) has been and must continue to be viewed as a narrow exception to the policy of the final judgment rule.[33] To apply it otherwise would necessarily lead to every like refusal of a trial judge to rule as requested to be termed the "denial of an injunction." Therefore, it is important that the Court look beyond the "literal characterization of an order as an injunction"[34] in determining the issue of appealability in order to avoid lengthy piecemeal litigation.

To allow an appeal at this stage of the proceedings is in direct conflict with this court's doctrine expressed in *Cohen v. Beneficial Industrial Loan Corp.*:[35]

> The effect of the statute is to disallow appeal from any decision which is *tentative, informal or incomplete.* Appeal gives the upper court a power of review. *Not one of intervention.* So long as the matter remains open, unfinished or inconclusive there may be no intrusion by appeal. (Emphasis added)[36]

Only where the decision effects a right "separate from and collateral to rights asserted in the action" shall an appealable order exist.[37] Where, as here, plaintiffs' motion for relief

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[32] *Hoots v. Commonwealth of Pennsylvania*, 71-538 (W.D. Pa. July 30, 1980) (Order of Court) App. ii.

[33] See *Western Geophysical Co. v. Bolt Associates, Inc.*, 463 F.2d 101, 104 (2nd Cir.), *cert. den.*, 409 U.S. 1040 (1972).

[34] See *Stateside Machinery Company, Ltd. v. Alperin*, 526 F.2d 480, 482 (3d Cir. 1975).

[35] 337 U.S. 541 (1948).

[36] *Id.* at 546.

[37] *Id.* at 541.

through the immediate implementation of a desegregation plan is a central ingredient to the basic cause of action, the jurisdictional prerequisites set forth in 28 U.S.C. §1292(a)(1) are not met.

The circuit court attempts to thwart the *Cohen* guidelines by reliance upon a theory that denial of plaintiffs' motion would have "serious, perhaps irreparable consequences."[38] While such may be an appropriate test to consider under this Court's decision in *Gardner v. Westinghouse Broadcasting Co.*,[39] the circuit court has failed to recognize that appealability in such circumstances requires the satisfaction of a two-pronged test.

As outlined in *Gardner,* the lower court must first have "finally determined that an injunction would not be available."[40] Only then should the court continue to a determination as to the seriousness of the consequences arising from the denial. The July 30, 1980, motion was specifically denied *without prejudice* and could have been renewed at the conclusion of hearings. Thus, on its face, the order of the district court clearly reveals that it was never intended to nor did it *finally determine* that the requested injunction would not be available. At most, the denial was merely an attempt by the trial judge to continue to a conclusion the orderly presentation of evidence by other litigants.

The circuit court again attempts to avert the *Gardner* finality argument by asserting that "the effect of the denial was to preclude any possibility of granting the *relief sought* by appellants."[41] Such denial, the court suggested, had "serious, if not irreparable consequences for General Braddock Area School District school children who will now have to wait

[38] *Hoots V* (App. at 13a).

[39] 437 U.S. 478 (1978).

[40] *Id.*

[41] *Hoots V* (App. at 13a).

another year before enrolling in racially integrated schools."[42] Such an assertion clearly could only have been made upon a total disregard of the facts before it as well as the legal and practical considerations involved in school desegregation.

The "relief sought" by plaintiffs' July 30, 1980 motion was the immediate implementation, within 31 days, of a multi-district consolidation plan which had neither been prepared or explored by the court, nor even defined as to its geographical configuration. In addition, plaintiffs' own expert testified that the mere preparation of a merger plan alone would take at least three months.[43] Accordingly, the implementation of consolidation relief in time for the coming 1980 school year was a practical impossibility. Further, the blind implementation of any such plan as plaintiffs might suggest without full consideration and evidentiary hearings as to the cost, workability, long term viability and effect upon desegregation and quality education of any such proposal was not only doomed to failure, but would in itself result in serious, irreparable consequences falling upon the plaintiffs, as well as total and immediate destruction of four to seven school districts then providing quality education.

By circumventing the accepted rule of "finality" prescribed by this Court, the court of appeals has set a precedent in school desegregation cases which will necessarily result not only in lengthy and time consuming piecemeal litigation but also in the eventual disregard of the trial court's jurisdiction in hearing all relevant and material evidence necessary for the formulating of a realistic, practical and effective remedy — the central ingredient to all such actions.

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[42] *Id.*

[43] July 29, 1980, Transcript, *Hoots v. Commonwealth of Pennsylvania*, No. 71-538 (W.D. Pa.) p. 215.

No consideration was given in this estimate as to the time necessarily incurred by the court in taking evidence as to the effect or viability of such relief.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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80-1819

Office-Supreme Court, U.S.
FILED
APR 30 1981
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1980

SWISSVALE AREA SCHOOL DISTRICT, CHURCHILL AREA SCHOOL DISTRICT, TURTLE CREEK AREA SCHOOL DISTRICT, and EDGEWOOD SCHOOL DISTRICT,

Petitioners,

v.

DOROTHY HOOTS, individually and as mother of her children JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRANCE KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated,

Respondents.

APPENDIX

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TABLE OF CONTENTS

Page

July 30, 1980 Order of United States District Court for Western District of Pennsylvania ii

January 26, 1981 Opinion and Order of three member panel of United States Court of Appeals for the Third Circuit 1a

February 25, 1981 Order of United States Court of Appeals for Third Circuit 53a

February 25, 1981 Order of Circuit Judge Leonard Garth to Amend Dissenting Opinion 56a

March 5, 1981 Opinion and Order of United States District Court for Western District of Pennsylvania 58a

March 24, 1981 Order of United States Distict Court for Western District of Pennsylvania 74a

April 6, 1981 Memorandum Order of United States District Court for Western District of Pennsylvania 75a

Pennsylvania State Board of Education Adjudication dated May 9, 1969 and filed June 23, 1969 .....79a

June 1, 1970 Opinion and Order of Court of Common Pleas of Allegheny County, Pennsylvania 83a

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY HOOTS, et al.,
Plaintiffs,

vs.

COMMONWEALTH OF PENNSYLVANIA, et al.,
Defendants.

Civil Action No. 71-538

ORDER

AND NOW, this 30th day of July, 1980, it is HEREBY ORDERED and DECREED that:

1. Plaintiffs' request of July 30, 1980, that the Tuition Plan and the tuition concept be rejected forthwith is DENIED, without prejudice to its renewal at the end of the hearings on said Plan.

2. Plaintiffs' request of July 30, 1980, that this Court grant them an injunction affording them merger, or consolidation, relief beginning in the fall of 1980 is DENIED, without prejudice.

/s/ GERALD J. WEBER
Chief United States District Judge

[CORRECTED COPY]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2116

DOROTHY HOOTS, individually and as mother of her children JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRANCE KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated,

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA; EDWARD X. HALLENBERG, President of the Allegheny County Board of School Directors; THE ALLEGHENY COUNTY BOARD OF SCHOOL DIRECTORS; W. DEMING LEWIS, Chairman of the Pennsylvania State Board of Education; THE PENNSYLVANIA STATE BOARD OF EDUCATION; MICHAEL SULLIVAN, President of the School District of the Borough of Braddock; THE SCHOOL DISTRICT OF THE BOROUGH OF BRADDOCK; ANDREW LISYAK, President of the School Board of the School District of the Borough of Rankin; THE SCHOOL DISTRICT OF THE BOROUGH OF RANKIN; LEO CAMPBELL, President of the School Board of the School District of the Borough of North Braddock; and THE SCHOOL DIS-

TRICT OF THE BOROUGH OF NORTH BRADDOCK; THE ALLEGHENY INTERMEDIATE UNIT BOARD OF SCHOOL DIRECTORS AND EDWARD X. HALLENBERG, AS PRESIDENT OF THE ALLEGHENY INTERMEDIATE BOARD OF SCHOOL DIRECTORS,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

D.C. Civil No. 71-00538

Argued November 3, 1980

Before: HUNTER, GARTH and
HIGGINBOTHAM, *Circuit Judges*

Opinion filed January 26, 1981

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OPINION OF THE COURT

HUNTER, *Circuit Judge.*

1. This is the fifth published chapter in the long history of this litigation.[1] The factual history and procedural posture of

[1]There have been four previous published opinions: Hoots v. Commonwealth of Pennsylvania, 334 F.Supp. 820 (W.D. Pa. 1971) *(Hoots I)* (denying defendants' motion to dismiss for failure to state a cause of action); Hoots v. Commonwealth of Pennsylvania, 359 F.Supp. 807 (W.D. Pa. 1973) *(Hoots II)* (holding that the creation of the General Braddock School District by the Pennsylvania State Board of Education was an act of *de jure* discrimination in violation of the fourteenth amendment); Hoots v. Commonwealth of Pennsylvania, 495 F.2d 1095 (3d Cir.), *cert. denied* 419 U.S. 884 (1974) *(Hoots III)* (dismissing appeals from district court's denial of school districts' petitions to intervene); and Hoots v. Commonwealth of Pennsylvania, 587 F.2d 1340 (3d Cir. 1978) *(Hoots IV)* (dismissing appeal from order denying approval of a remedial plan for lack of appellate jurisdiction).

In addition we have denied plaintiffs' applications for writ of mandamus on two occasions. Hoots v. Weber, No. 79-1474 (3d Cir. May 2, 1979); Hoots v. Weber, No. 80-2124 (3d Cir. Sept. 9, 1980).

the case were ably recited by Judge Garth in this court's October, 1978 opinion.[2] Here, we will briefly summarize that account and then supplement it with a recital of subsequent events leading to the instant appeal.

I.

2. Plaintiffs, mothers of children who attend public schools in the General Braddock Area School District ("GBASD") in Allegheny County, Pennsylvania, filed a complaint on June 9, 1971, alleging that the consolidation of various school districts in that county had resulted in the creation of racially segregrated schools.[3] The district court, in an opinion and order filed on May 15, 1973, held that the creation of the GBASD by the Pennsylvania State Board of Education and the Allegheny Intermediate Unit Board of School Directors was "an act of *de jure* discrimination in violation of the Fourteenth Amendment."[4] Defendants were given forty-five days to prepare and submit a comprehensive plan for school desegregation in the central part of eastern Allegheny County.[5]

3. In September, 1973, defendants filed Plan "22-W" with the district court. The most prominent feature of the Plan was the consolidation of seven adjacent school districts, including GBASD, into two. The school districts affected by "22-W" were permitted to intervene to offer evidence on the Plan. In an order and memorandum opinion filed on May 7, 1975, the district court rejected Plan 22-W.[6] Defendants were ordered to submit another plan.

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[2] *Hoots IV*, 587 F.2d 1340 (3d Cir. 1978).

[3] The original complaint is *reprinted in* Appendix for Appellants at 17a-32a. An amended complaint filed on July 30, 1971, is *reprinted in* Appendix for Appellants at 45a-62a.

[4] *Hoots II*, 359 F.Supp. at 823.

[5] *Hoots II*, 359 F.Supp. at 824-24.

[6] *Reprinted in* Appendix for Appellants at 203a-207a.

4. In September, 1975, the Commonwealth submitted a new plan, "Plan A," providing for the consolidation of General Braddock with neighboring school districts. On November 18, 1977, the district court denied the Commonwealth's motion for approval of Plan A even though it observed that the Plan involved a "more moderate realignment" of school boundaries than earlier plans.[7] The memorandum and order denying approval of the Plan also denied "any necessary injunctive order to implement such plan... without prejudice to the right of any party to submit further plans or proposal in support thereof."[8]

5. Plaintiffs appealed the district court's order withholding approval of Plan A to this court. We dismissed that appeal for want of appellate jurisdiction, noting that the district court's order was "neither a final order nor an appealable interlocutory order which can vest this Court with appellate jurisdiction." *Hoots IV*, 587 F.2d at 1342. In dismissing the appeal, however, we anticipated the speedy resolution of the dispute and the implementation of appropriate relief by the district court:

> We are confident that, in light of the long history of this litigation and the sensitive, constitutional nature of the relief sought, the district court will require submission of a plan forthwith and certainly within the time limits of its original order, will expedite all further proceedings, and will give priority on its calendar to consideration and implementation of the plan. This being so, it would appear that an appropriate final order can be entered by year end which will grant plaintiffs the relief to which they are entitled under the district court's order of May 15, 1973.

587 F.2d at 1351. (footnote omitted).

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[7]The plan would have consolidated seven school districts into three. *See Hoots IV*, 587 F.2d at 1345 n.27.

[8]*Reprinted in* Appendix for Appellants at 208a-215a.

6. Following the dismissal of the appeal, appellants, on January 25, 1979, asked the district court to order the Commonwealth to submit within forty-five days a desegregation plan that was "interdistrict in character" involving either a redistricting of GBASD, or "the tuitioning of current school-age students in General Braddock Area School District to appropriate surrounding school districts. . .," or both. Appendix for Appellants at 235a.

7. On February 6, 1979, the district court held a status conference at which "a wide range of possible remedies [was] discussed and "argued," including district consolidation, the tuition plan and a newly proposed "upgrade" plan for the internal improvement of the quality of GBASD's schools. Application for Writ of Mandamus, *Hoots v. Weber*, No. 79-1474, at 7-8, *reprinted in* Appendix for Appellants at 243a-244a. No order was issued by the district court at the conference.

8. On April 16, 1979, plaintiffs filed an application for Writ of Mandamus requesting this court to order the district court to "direct the state defendants to submit another interdistrict plan which would involve the use of tuition as a technique to remedy the problem presented by C.A. No. 71-538." Application for Writ of Mandamus, *Hoots v. Weber*, No. 79-1474, at 2 *reprinted in* Appendix for Appellants at 23a. We denied the application on May 2, 1979, "[i]n view of the answer of Chief Judge Weber, and specifically his statement that he plans to proceed promptly." *Hoots v. Weber*, No. 79-1474 (3d Cir. May 2, 1979), *reprinted in* Appendix for Appellants at 312a.

9. On May 17, 1979 the district court entered two orders: 1) it directed the Commonwealth to prepare and file a tuition voucher plan by August 15, 1979 for grades 7-12, or 10-12;[9] and

[9]The district court's memorandum order observed:

> [i]t now appears to the Court that the most workable plan would be a tuition voucher plan which would enable all students of the General Braddock Area School system to achieve a quality education free from

(continued)

2) it added eight school districts as parties solely for the remedial phase of the case.[10] The newly joined school districts then filed motions to dismiss; and in response to that motion the court on June 12, 1979 ordered plaintiffs to brief the *Milliken v. Bradley* question of whether the named school districts could be included in a remedial plan.[11]

10. The Commonwealth filed a proposed tuition plan and moved for its approval on September 10, 1979.[12] After a hearing on November 17, 1979, the district court denied the motion and orally ordered the Commonwealth to prepare a more detailed plan.

---

the effects of the segregation pattern now existing, by the adoption of a tuition voucher plan available to all the General Braddock Area students above the elementary school level, making use of the physical plants and facilities, and the variety of educational programs offered by nearby school districts.

Appendix for Appellant at 313a.

[10]The following school districts were added: Turtle Creek Area School District; Edgewood School District; West Mifflin School District; Steel Valley School District; East Allegheny School District; Swissvale Area School District; Churchill Area School District; and Gateway School District. Appendix for Appellants at 316a.

[11]Milliken v. Bradley, 418 U.S. 717, 744-745 (1974), discussed "the validity of a remedy mandating cross-district or interdistrict consolidation to remedy a condition of segregation found to exist in only one district:"

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation .... Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation .... without any interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

[12]On August 3, 1980, the Commonwealth had moved for an extension of the August 15, 1980 deadline for submission of its plan. The motion was unopposed and was granted on August 7, 1980.

11. The Commonwealth filed its more detailed tuition plan on May 15, 1980 ("The Tuition Plan"). The plan provided that: 1) all the GBASD students in grades 7-12 would be transferred to eight surrounding school districts; 2) all the GBASD secondary schools would be closed; 3) all the students would be able to choose their new schools, subject to limitations on the number of students that would be assigned to each school district; 4) GBASD would pay the tuition of all of the transferred students on the basis of the average cost of educating a student in the receiving district; 5) only the GBASD students would be transported; and 6) there would be no transfer of elementary school students.[13]

12. On May 22, 1980, the Commonwealth submitted a second plan, "a Metropolitan Desegregation Plan for General Braddock Area School District" ("The Metropolitan Plan"). *Reprinted in* Appendix for Appellants at 486a-516a. This plan called for the consolidation of GBASD with three surrounding school districts: Edgewood, Swissvale and Turtle Creek.[14]

13. On June 6, 1980, GBASD filed its "upgrade plan." This plan provided for an intradistrict remedy: GBASD would improve the quality of its schools' programs and facilities in order to attract parochial school students back to the public schools. *Reprinted in* Appendix for Appellants at 475a-485a.

14. The district court ordered all parties to file their objections to the various plans by June 16, 1980. Appellants argued for the rejection of the Tuition Plan because of its exclusion of elementary school pupils. All but one of the school districts *not* included in the Metropolitan Plan argued for its adoption for the rejection of the Tuition Plan. All of the school districts supported the upgrade plan; appellants opposed it.

[13]Excerpts from the Commonwealth's May 15, 1980 plan are *reprinted in* Appendix for Appellants at 358a-474a.

[14]On August 4, 1980, the Commonwealth moved to withdraw the Metropolitan Plan from the district court's consideration. The court has not ruled on this motion. Transcript of Oral Argument, Hoots v. Commonwealth of Pennsylvania, No. 80-2116, at 92 (3d Cir. November 3, 1980).

15. On July 14, 1980, hearings commenced on the Tuition Plan.[15] The Commonwealth offered evidence supporting the Plan, arguing that it would offer a non-segregated education for all children in grades 7-12. The Commonwealth admitted that the plan did not address the elementary school grades, but expressed its willingness to consider modifications to the plan.[16] The Commonwealth rested on July 17, 1980. At the conclusion of the Commonwealth's case, plaintiffs (along with defendants East Allegheny, GBASD, Steel Valley, and West Mifflin school districts) orally moved for the rejection of the Tuition Plan. The motion was denied. Appendix for Appellants at 529a.

16. Plaintiffs then presented testimony critical of the Tuition Plan. The testimony centered on the inadequacy of the relief insofar as it did not provide for the desegregation of grades K-6. Plaintiffs' witnesses were critical of the plan's allocation of GBASD students among eight, rather than fewer, school districts. Plaintiffs also objected to shifting the entire burden of relief to GBASD.

17. On July 24, 1980 plaintiffs filed a written motion to reject the Tuition Plan and for an injunction setting a timetable to implement interdistrict relief beginning in the fall of 1980. On July 28, 1980, the district court orally denied the motion. Appendix for Appellants at 556a-560a. The plaintiffs then

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[15]There is some dispute between the parties as to the scope of the July and August district court hearings. At the conclusion of oral argument, we requested the parties to submit letters addressing the question of whether the hearings were limited to consideration of the Tuition Plan or whether they also included consideration of interdistrict consolidation plans as well.

We have reviewed the submissions by the parties and believe that the trial court intended to limit the hearings to the question of whether it should adopt the Tuition Plan. Although the court received some evidence concerning the advisability of implementing interdistrict consolidation relief, the Tuition Plan remained the primary focus of the hearings.

[16]The district court left open the possibility that it might order the Commonwealth to modify the plan to include grades K-6. Transcript, Hoots v. Commonwealth of Pennsylvania, No. 71-538, at 192-93 (W.D. Pa. July 14, 1980).

continued their presentation of evidence, which was not only critical of the Tuition Plan, but also urged the adopted of consolidation relief similar to the Metropolitan Plan.

18. On July 30, 1980, at the close of their case, plaintiffs once again filed a written motion asking the district court to reject the Tuition Plan and to grant an injunction providing for immediate relief in the form of a merger or consolidation plan, and for the imposition by the court of a timetable to implement such a plan beginning in mid-school year 1980-81. The district court denied the motion without prejudice.[17]

19. On August 4, 1980 plaintiffs filed a notice of appeal from the district court's July 28 (oral) and July 30 (written) orders denying injunctive relief. An application for a writ of mandamus was filed on August 11, 1980. We granted plaintiffs' motion for expedited appeal on August 14, 1980. *Hoots v. Commonwealth of Pennsylvania*, No. 80-2116 (3d Cir. August 14, 1980). Subsequently, we denied the application for mandamus on September 9, 1980. *Hoots v. Weber,* No. 80-2124 (3d Cir. September 9, 1980).

20. Following the notice of appeal, the district court continued to take testimony on the Tuition Plan. At the conclusion of hearings on August 22, 1980, the district court requested briefing on two issues: 1) which school districts could be included, consistent with *Milliken v. Bradley*, in a remedial plan; and 2) whether the Tuition Plan, as a matter of law, failed to correct the constitutional violation. The court scheduled arguments on these issues for October 2, 1980, and noted that

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[17]The district court's July 30 order provided:

> 1. Plaintiff's request of July 30, 1980 that the Tuition Plan and the tuition concept be rejected forthwith is denied, without prejudice to its renewal at the end of the hearings on said Plan.
>
> 2. Plaintiff's request of July 30, 1980, that this Court grant them an injunction affording them merger, or consolidation relief beginning in the fall of 1980 is denied, without prejudice.

Reprinted in Appendix for Appellant at 584a.

their resolution would determine the possibility of future hearings on either merger or upgrade plans.

21. Oral argument was held before this court on November 3, 1980. Subsequently, on November 20, 1980 we granted appellants' motion that the record be supplemented with all documents and transcripts of testimony and argument filed in the district court after July 30, 1980. We filed a second order to supplement the record on December 4, 1980.

22. The supplemented record reveals that on November 13, 1980 Judge Weber stated that he would schedule no further proceedings until this court ruled on the instant appeal. Further, he ordered that disposition of the matters briefed and argued on October 2, 1980 be stayed pending appeal.

II.

23. The threshold question in this appeal is that of appellate jurisdiction. Appellants assert that Judge Weber's July 30, 1980 order is either final within the meaning of 28 U.S.C. § 1291 (1976),[18] or that the order comes within the class of appealable injunctive orders under 28 U.S.C. § 1292(a)(1) (1976).[19] The Commonwealth appellees "concede" jurisdiction under section 1292(a)(1) but challenge our jurisdiction under section 1291. Several school district appellees contest jurisdiction on either basis.

24. It is the duty of this court to examine its jurisdiction in every case, *Mansfield, Coldwater & Lake Michigan Railway*

[18]Section 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ... except where a direct review may be had in the Supreme Court.

[19]Section 1292(a)(1) provides:

> (a) The courts of appeals shall have jurisdiction of appeals from:
> (1) Interlocutory orders of the district courts of the United States, ... or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

Company v. Swan, 111 U.S. 379 (1884); *United States ex rel. Esola v. Groomes*, 520 F.2d 830, 834 n.16 (3d Cir. 1975), notwithstanding any agreement among the litigants that such jurisdiction exists. *United States v. Cities Service Company*, 410 F.2d 662, 663 (1st Cir. 1969). Accordingly, we must examine the text of Judge Weber's July 30, 1980 order to see if it is appealable under either section 1291 or section 1292(a).

25. Appellants premise their claim of section 1291 jurisdiction, as they did in *Hoots IV*, on the Sixth Circuit's decision in *Kelley v. Metropolitan Board of Education*, 436 F.2d 856 (6th Cir. 1970).[20] We once again find this argument unpersuasive, and find that the district court's July 30 order was not a final decision within the meaning of section 1291. This circuit has consistently given a narrow definition to the class of final orders that are appealable. *Hoots IV*, 587 F.2d at 1347; *Bachowski v. Usery*, 545 F.2d 363, 373-74 (3d Cir. 1976). The July 30 order does not fall within this narrow class, and hence is not appealable under section 1291. A contrary finding would substantially erode the purpose of the final order doctrine. *Bachowski*, 545 F.2d at 373. *See Hoots IV*, 587 F.2d at 1346-48.

26. Appellants argue, in the alternative, that the July 30, 1980 order is appealable as a denial of an injunction under 28 U.S.C. §1292(a)(1) (1976). They claim that the district court's denial of an injunction that would have afforded them merger or consolidation relief falls within the class of appealable interlocutory orders under section 1292(a)(1).

27. The July 30 order, on its face, denied injunctive relief to appellants. We have observed, however, that "literal characterization of an order as an injunction only begins the inquiry

[20] That case involved the desegregation of the Nashville, Tennessee schools. The school board had submitted a plan for desegregation relief to the district court, but the court stayed indefinitely all proceedings pending the Supreme Court's decision of desegregation cases on its docket. The Sixth Circuit held that a stay for an indefinite time was appealable as a final order under §1291, and vacated the stay.

into appealability." *Stateside Machinery Company, Ltd. v. Alperin,* 526 F.2d 480, 482 (3d Cir. 1975); *Rodgers v. United States Steel Corporation,* 541 F.2d 365, 372 (3d Cir. 1976). We must look beyond the text of the order and read it in the context of the history and purpose of section 1292(a)(1). *See Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176, 180-81 (1955); *Stewart-Warner Corporation v. Westinghouse Electric Corporation,* 325 F.2d 822, 829-30 (2d Cir. 1963) (Friendly, J. dissenting), *cert. denied* 376 U.S. 944 (1964). Appealability of interlocutory orders under section 1292(a)(1) developed because of a "need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Gardner v. Westinghouse Broadcasting Co.,* 437 U.S. 478, 480 (1978), *quoting Baltimore Contractors,* 348 U.S. at 181.

28. We find that the July 30, 1980 order denying injunctive relief to appellants effective in the fall of 1980 was an interlocutory order of "serious, perhaps irreparable consequences" that vests this court with appellate jurisdiction under 28 U.S.C. §1292(a)(1) (1976).[21] The district court denied the relief requested by appellants, and the denial had serious, if not irreparable consequences for GBASD school children who will now have to wait another year before enrolling in racially integrated schools. "Although the trial court denied the motion for an injunction "without prejudice,"[22] the effect of the denial was to preclude any possibility of granting the relief sought by appellants." Thus the July 30, 1980 order is distinguishable from the order appealed in *Hoots IV* which did not deny any "element of the relief sought by plaintiffs" and "did not seek any injunction." *Hoots IV,* 587 F.2d at 1348 n.42.[23]

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[21] Judge Higginbotham is of the view that there is also appellate jurisdiction under 28 U.S.C. §1291 (1976).

[22] *See* n. 17, *supra.*

[23] *Cf.* United States v. Texas Educational Agency, No. 79-2833 (5th Cir. Nov. 15, 1979) (Court of appeals took jurisdiction over trial court's denial of immediate injunctive relief in school desegregation case).

III.

29. Having decided that we have jurisdiction to review the district court's July 30, 1980 order, we begin our consideration of the merits by observing that our role as an appellate court is a limited one. As this court held in *Evans v. Buchanan*, 555 F.2d 373, 380 (3d Cir. 1977) (en banc), in school desegregation cases "[f]ormulating a realistic, practical, and effective remedy is a job peculiarly within the province of the trial court, whose position gives it a quantum advantage over an appellate court in weighing the 'practicalities of the situation.'" In litigation as long and complex as this, the fashioning of relief should normally "be entrusted in large measure to the sound discretion of the District Court Judge who has lived with [it] for so many years." *Gilmore v. City of Montgomery*, 417 U.S. 556, 577 (1974) (Marshall, J. concurring).

30. Balanced against our deference to the trial court, however, is an affirmative obligation to ensure that *de jure* discrimination in public schools is remedied "forthwith." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 14-15 (1971); *See also Carter v. West Feliciana Parish School Board*, 396 U.S. 290 (1970); *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969); *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968). Although the primary responsibility for remedying past discrimination rests with the school authorities, *Green*, 391 U.S. at 437-38, "in default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." *Swann*, 402 U.S. at 16. *See also Columbus Board of Education v. Penick*, 443 U.S. 449, 458-61 (1979). The district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Green*, 391 U.S. at 438 n.4, *quoting Louisiana v. United States*, 380 U.S. 145, 154 (1965). *See also United States*

v. DeSoto Parish School Board, 574 F.2d 804, 811 (5th Cir.) *cert. denied*, 439 U.S. 982 (1978). ("If the school board defaults in its duty, the responsibility of the District Court is equally clear and compelling: to use its broad and flexible equitable powers to implement a remedy.")

31. Striking the required balance in this case, we conclude that the formulation of an appropriate remedy lies within the sound discretion of the district court. Accordingly, we decline to grant appellants' request that we require the implementation of merger or consolidation relief. We also decline, at this time, to reject the concept of a tuition plan for GBASD. The primary duty to choose between these competing remedial plans rests with the district court. Regardless of the particular plan chosen by the district court, the remedy must be broad enough to completely eradicate the *de jure* discrimination found by the trial court in *Hoots II*. *See Anderson v. Dougherty County Board of Education*, 609 F.2d 225, 226 (5th Cir. 1980).

32. Although we held that the duty to fashion a remedy is charged to the district court, we are nonetheless obligated to ensure that relief be implemented as promptly and as practicably as possible. Once before, we expressed our confidence that the parties would assist the trial court in reaching a speedy resolution of the remedial phase of this protracted case. But the vagaries of litigation, including a change in appellant's counsel and shifting litigation strategies and positions, have prevented this result. Accordingly, we are constrained to take affirmative steps to guarantee that relief will be implemented forthwith.

33. Our understanding of the posture of the case is that hearings have been completed on the Tuition Plan and that at least some testimony has been taken on the merits of consolidation or interdistrict relief.[24] The district court has taken briefs and heard arguments on the *Milliken* question, but has not yet ruled on which school districts can be included within an

[24] *See* discussion at n. 15, *supra*.

interdistrict remedial plan. On November 13, the district court suspended all further proceedings pending our decision.

34. We believe it to be essential that the district court afford relief to appellants that will be effective in the fall of 1981. Under no circumstances should a new school year begin in the fall of 1981 without an acceptable remedial plan in place.

35. Accordingly, we order the district court[25] to expedite its consideration of this case so that within ninety days[26] of the issuance of the mandate of this court it shall:

1) complete all hearings and necessary proceedings on the merits of the competing remedial plans for the desegregation of GBASD;
2) decide the *Milliken v. Bradley* issue of which school districts may be included within an interdistrict remedy; and
3) enter an appropriate final order granting appellants the relief to which they are entitled under the district court's order of May 15, 1973, such relief to be effective and implemented by the beginning of the first semester of the school year in the fall of 1981.

We are confident that with the cooperation of all parties, and with complete mobilization of the court's and the parties' efforts and resources in this compelling endeavor, this timetable may and will be achieved.

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[25] Although our order is necessarily directed to the district court, we fully recognize that the delay in this litigation is in large part attributable to the actions of the parties, and not to the Chief Judge of the Western District, who has valiantly and ably wrestled with the complex issues of this case since 1971. Thus, contrary to the assertion made by the dissent, our order does not reflect any criticism, implied or express, of the Chief Judge's conduct of the litigation. Accordingly we admonish the parties to provide the district court with whatever assistance it may require to comply with our mandate.

[26] *Cf.* Anderson v. Dougherty County Board of Education, 609 F.2d 225, 226 (5th Cir. 1980) (Court of appeals ordered district court to adopt a desegregation plan within sixty days of entry of its order).

IV.

36. Therefore, we vacate the July 30, 1980 order of district court and remand for proceedings consistent with this opinion. The mandate of this court shall issue forthwith.

LEON HIGGINBOTHAM, JR., *Concurring.*

On June 9, 1971, Dorothy Hoots and other concerned parents of children attending public schools in the General Braddock Area School District (GBASD) in Allegheny County, Pennsylvania, filed a complaint challenging its racially segregated school system. On May 15, 1973, the district court held that the creation of the GBASD was "an act of *de jure* discrimination" in violation of the fourteenth amendment. *Hoots v. Commonwealth of Pennsylvania,* 359 F.Supp. 807, 823 (W.D.Pa. 1973), (*Hoots II*), *appeal dismissed,* 495 F.2d 1095 (3d Cir. 1974), *cert. denied,* 419 U.S. 884 (1974). Almost seven years have since elapsed without the district court ordering any remedy. There have been numerous appeals during this period attempting, without success, to expedite the implementation of an effective remedy. Judge Hunter has dealt with this problem of unconscionable delay in a thoughtful and moderate opinion which imposes quite reasonable time limitations. I join Judge Hunter in the result.[1]

I feel compelled to write separately, however, to emphasize my fundamental differences with the dissent of Judge Garth, who challenges the power and the wisdom of this court's

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[1] If I had been a member of the panel in *Hoots IV,* 587 F.2d 1340 (3d Cir. 1978), I would probably have agreed with Judge Gibbons' dissent. From my view, Judge Gibbons' conclusion was unassailable. As he wrote:

> On the record before us, where the very object of the appeal is to cure unconscionable delay which is causing irreparable harm, the majority's reference to "the goal of speedy justice" as a justification for dismissing it rings hollow. And as to caseload considerations, this is one of those cases in which our concern about the caseload must yield to our obligation to enforce the supremacy of federal law. There is no justification for dismissing this appeal.

587 F.2d at 1357 (footnote omitted).

imposing a 90-day timetable on the district court to choose a remedial plan. Despite the passage of 9½ years since the filing of the original complaint, and the graduation of black students each year from a public school system held to be in violation of the United States Constitution, the dissent today claims that we are powerless to place *any* time limitations on the district court's consideration of possible remedial decrees. I find this view of the powerlessness of an appellate court contrary to judicial precedent and doctrine and a derogation of our judicial mandate to enforce the provisions of the Constitution. I know of no other judicial authority, and the dissent does not cite any, which has ever taken such a position. I reject it completely.

I.

Judge Garth provides three reasons for refusing to impose a time limitation on the district court. First, he claims that an appellate court lacks the power under any circumstance to impose a timetable for decision on a district court judge. Second, he claims that even if we do possess such power, it is inadvisable as a matter of policy that we exercise it. He believes this is especially true in this case where, according to Judge Garth, the 9½ year delay is not the responsibility of the district court judge. Finally, he claims that a 90-day requirements is too restrictive. I find his hypothetical and speculative arguments unpersuasive and divorced from the stark reality of this inexcusable 9½ year delay.

A.

THE POWER TO IMPOSE A TIMETABLE

The dissent's contention that we lack the power to place time limitations on a district judge is contradicted by numerous federal decisions. Every court which has reached this issue has found that an appellate court possesses the power, in exceptional circumstances, to impose time limitations on the district court. In *Anderson v. Dougherty County Bd. of Educ.*, 609

F.2d 225, 226 (5th Cir. 1980), the appellate court ordered "the district court to adopt a plan for the desegregation of the elementary and junior high schools in the Dougherty County School system within sixty days from the entry of [the appellate court's] order," and retained jurisdiction. The Fifth Circuit also imposed a mandatory timetable in the case of *United States v. Texas Educ. Agency*, No. 79-2833 (5th Cir. November 15, 1979) (per curiam). The dissent characterizes the *Anderson* decision as "improvident and improper," but cites no cases from the Fifth Circuit or any other circuit disapproving such a decree. Typescript at 45-46 n.8.

Indeed, numerous courts have gone even further and themselves drafted injunctions where the district court was unwilling or unable to act. For example, in *United States v. Lynd*, 301 F.2d 818 (5th Cir.), *cert. denied*, 371 U.S. 893 (1962), the Fifth Circuit employed extraordinary powers to remedy violations of voting rights by granting a temporay injunction at the Court of Appeals level. Judge Tuttle, writing for the court, ordered the injunction "transmitted forthwith to the Clerk of the District Court," bypassing completely a remand to the district court for fashioning an entry of the injunction. 301 F.2d at 823. *See also United States v. Lynd*, 349 F.2d 785 (5th Cir. 1965); *Stell v. Savannah-Chatham County Bd. of Educ.*, 318 F.2d 425 (5th Cir. 1963). An even more compelling example of the power of the Court of Appeals was evidenced in *United States v. Barnett*, 330 F.2d 369 (5th Cir. 1963) (the James Meredith case), *cert. denied*, 376 U.S. 681 (1964), where the appellate court, sitting en banc, heard witnesses in open court and entered "its order, findings of fact and conclusions of law and judgment of civil contempt." 330 F.2d at 376. Although Chief Judge Weber's handling of the *Hoots* case is not comparable to the actions of the district court judges in *Lynd* and *Barnett*, these cases demonstrate the power and duty of the Court of Appeals to make real every citizen's fundamental civil rights.

The dissent does not challenge the power of the circuit court to take testimony and to fashion and enter its own injunctive decree, as in *Lynd* and *Barnett*. Rather, it claims, that the exercise of such powers "obviously [has] nothing to do with a Court of Appeals order which commands that a district court deal with discretionary and evidentiary matters within a particular time frame". Typescript at 51. Yet the usurpation by the Court of Appeals of the district court's duty to hold evidentiary hearings and to fashion a remedy is a far greater intrusion on the lower court's discretion than a modest 90-day order. If the dissent does not challenge the power of the court to take these extraordinary actions, I fail to see how it can deny its power merely to place a time limitation on the district court's decision. It is precisely because we are unwilling to intrude upon the district court's discretion any further than is necessary that we have sent the case back for a final decision by Chief Judge Weber.

B.

THE WISDOM OF PLACING TIME LIMITATIONS ON JUDGES

The dissent's second argument is that, even if we have the power to impose such a time limitation, it is "inadvisable" that we exercise it. Setting any timetable would be "unseemly, injudicious, improper and unrealistic" because it unduly limits the discretion of the district court judge and upsets him emotionally. The dissent is replete with scare words predicting doom for the federal judiciary if, after 9½ years, the district court is ordered to relve the case within an additional 3 months. It sees this order as carrying the "seeds of great mischief and potential disruption" and finds it "demeaning and even insulting" to the district court judge because it "misconceived and misdirected" and implies "criticism" of the district judge. Typescript at 37-40. Judge Garth sees the majority's opinion as an implied threat to hold the district judge "in contempt," to

subject him to "some form of disciplinary proceeding," to "remove his caseload," and finally, to "point a gun without the ability to pull its trigger". Typescript at 49.

I cannot find a basis for any responsible judge to be demeaned because a judgment is vacated and remanded to him in a 9½ year case where the litigants have received no relief. Article III judges are, or should be, mature enough to recognize that remands are not "demeaning and even insulting." Speaking of the Supreme Court, Justice Robert Jackson once commented, "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 433, 540 (1953) (Jackson, J., concurring). In my view, district court judges have a healthy skepticism of the infallability of all appellate courts. I do not believe that they will shirk from their duty and obligations when a "higher" court disagrees with them on the law. Hardly a week goes by without this court reversing a district judge. I have yet to find any district court judge who believes that a good faith reversal or remand is "pointing a gun" to the lower court judge's head.

Judge Garth stresses what he perceives as the "humiliation" of the district judge because of this 90-day order. Our court should have equal concern for the humiliation thrust upon innocent black children who for almost a decade have been begging for judicial relief from the persistent constitutional violation which Chief Judge Weber[2] found they endure, and of the humiliation when hundreds of black children have already graduated without ever having their constitutional rights enforced.

Nowhere is the dissent more misleading and deceptive than the "Ode" to district court judges. The dissent distorts the issue totally and measures the precious constitutional rights of children by impermissible standards. While I appreciate the

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[2]I would like to make it clear that I have high regard for Chief Judge Weber. While I am dissatisfied with his pace in handling this particular case, my opinion is not intended to be disparaging of him as a Judge or as a person.

fact, as Judge Garth notes, that he was a district court judge for three years, the judges of the majority are not bereft of state trial or district court experience. I am not hostile to district court judges and I will not debate the claim that district court judges are "the most diligent, conscientious and hard-working judicial cadres in this country." Typescript at 39. I recognize that Chief Judge Weber is an excellent judge; he is not malevolent, venal or incompetent. But despite my agreement with the dissent's accolades on the general exellence of district judges, I believe that Chief Judge Weber, like all of us, is not infallible. Far more important than back-patting rhetoric among the judicial fraternity as a mutual admiration society, the citizens of this nation are entitled to have their civil rights implemented promptly even if, in the words of the dissent, some district judges might "have resentment" of our views of the Constitution.

Judges and lawyers should never be shocked with time limitations to finish their obligations. This court's own Internal Operating Procedures (IOP's) are replete with time limitations on judges and the parties which can be more restrictive and demanding than the present 90-day order. We require that parties submit briefs four weeks before oral argument. IOP, Chapter I(A). We require that a judge write a dissent within 45 days of the circulation of the majority opinion. IOP, Chapter V(D). And we require that judges vote to rehear a case, or file a dissent to a denial of a petition for rehearing, within 8 days of the circulation of the petition for rehearing. IOP, Chapter IX(A)(3), (A)(6)(d).

The dissent's rejection of the time limitations is predicated on the view that we never could enforce such an order. Of course, all appellate decisions ultimately rest upon the willingness of district court judges to obey them, rather than any inherent power we have to physically enforce compliance. Time limitations are not more inherently unenforceable than any other type of order. If the power of this court to act were limited, as the dissent suggests, to those situations where we

could physically force compliance on district court judges, then this court would be stripped of its purpose and function.

It is the responsibility of a district court judge to shape the movement of cases through his or her court. Once suit has been brought, he or she has a duty to meet this constitutional mandate. Yet nearly ten years have elapsed in this case since the suit was filed. The original plaintiffs, along with a generation of black students from Allegheny County, have already graduated from school and irretrievably lost the opportunity ever to receive a public school education which conforms with constitutional requirements. After the judge has struggled without success for almost ten years to meet this mandate, and we have recommended in a previous appeal of two years ago that the case be disposed of within six months, it would be a derogation of our function as an appellate court not to impose a requirement that the court act with dispatch.

Neither Chief Judge Weber nor district court judges in general are on trial here. The issue is whether black children who have waited patiently at the courthouse door for more than 9½ years without an ounce of relief are entitled to a decree that their matter be expedited within a specific time frame. The rights of citizens are not contingent upon a Gallup poll survey as to whether a district judge or even the community in general is receptive to a constitutional mandate. If the Constitution required that appellate courts worry about "resentment on the part" of a district court judge or by the community, as Judge Garth suggests, Typescript at 39, then James Meredith would still be waiting in vain to enter the University of Mississippi, Autherine Lucy's application to the University of Alabama would still be in limbo, and thousands of blacks denied the right to vote in Forrest County, Mississippi would still be disenfranchised. *See United States v. Barnett; Lucy V. Adams,* 228 F.2d 619 (5th Cir.), cert. denied, 351 U.S. 931 (1956); *United States v. Lynd.*[3]

[3] *See generally* Note, *Judicial Performance in the Fifth Circuit,* 73 Yale L.J. 90 (1963).

Fortunately, neither the Court of Appeals for the Fifth Circuit nor any other federal appellate court in the nation has adopted the unconstitutional standard urged in the dissent.

C.

THE CAUSE OF THE DELAY

Judge Garth also contends that whatever the general merits of restricting the timetable of district court decisions, the facts of this case do not warrant such action. He suggests that the 9½ year delay is due entirely to the actions of the plaintiffs, and therefore the district should not be held accountable for the time delay.

The delay in this case is allegedly due to "two improvident appeals and the recent decision of the plaintiffs to change direction in midstream." Typescript at 40-41 (footnote omitted). A review of the factual circumstances under which the plaintiffs were forced to act reveals that the two appeals were taken in an effort to force the implementation of a remedy and not to delay the proceedings. Indeed, virtually every action by the plaintiffs has been in response to inaction by either the district court or the defendants.

The plaintiffs' first appeal[4] was taken to this court in 1977 after Chief Judge Weber issued his November 1977 Order denying Plan A. Plan A was a school district consolidation program first submitted to the Pennsylvania State Board of Education (State Board) in July of 1973 by the plaintiffs. The plaintiffs endorsed this plan from 1973 until it was rejected by the district court. The State Board itself adopted Plan A after hearings in 1975, and at the hearing held before Chief Judge Weber, only one defendant district opposed its implementation. Nevertheless, Judge Chief Weber rejected Plan A and another consolidation alternative (Plan 22-W) because he

[4]An earlier appeal was taken by the defendants but presumably the plaintiffs cannot be charged with the delay incident to it. *Hoots III*, 495 F.2d 1095 (3d Cir.), *cert. denied*, 419 U.S. 884 (1974).

found "no evidence of broad base community support for such a remedy."[5] Order of November 18, 1977, p. 4, *reprinted in Appendix* at 211a.

The plaintiffs appealed this order. Judge Garth, writing for a divided court, held that there was no appealable order and dismissed the appeal. *Hoots IV*. Interestingly enough, Judge Garth observed in *Hoots IV* that:

> The order of May 15, 1973 provided for submission of a plan within forty-five days. Inasmuch as the plaintiffs now regard the Commonwealth's Plan A as affording appropriate relief, a common base apparently exists from which a remedy may be expeditiously fashioned.

587 F.2d at 1351 n.57. As has already been exhaustively detailed, the *Hoots IV* admonition by Judge Garth did not result in the desegregation of GBASD or in any remedy for plaintiffs during the 26 months since that decision was filed.

The second "improvident appeal" resulted from the plaintiffs' motion of January 29, 1979 asking Chief Judge Weber to order the Commonwealth to submit one or more plans to the district court.[6] This motion followed repeated efforts by the court and the plaintiffs to move the Commonwealth to propose an acceptable plan.[7] When the district court by mid-April of

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[5]It is axiomatic that community resistance to a desegregation remedy is an inappropriate rationale for rejecting an otherwise acceptable plan. Brown v. Bd. of Educ. of Topeka, Kansas *(Brown II)*, 349 U.S. 294, 300 (1955); Cooper v. Aaron, 358 U.S. 1 (1958); Monroe v. Bd. of Comm'rs of the City of Jackson, 391 U.S. 450 (1968).

[6]After Chief Judge Weber's initial 1973 order directed the Commonwealth to submit a plan for desegregation within 45 days, the Commonwealth sought and received two extensions which resulted in the passing of the 1973-1974 and 1975-1976 school years without a remedy in place.

[7]It is clear that if a defendant fails to come up with an adequate remedy then the duty falls upon the district court to "make every effort to achieve the greatest possible degree of actual desegregation." Davis v. School Comm'rs of Mobile County, 402 U.S. 33, 37 (1971). The federal courts have the authority to formulate broad remedies. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Keyes v. School District No. 1, Denver, Colorado, 413

(continued)

1979 had still taken no action on the January 29 motion, the plaintiffs petitioned this court for a writ of mandamus. This court denied the writ after receiving a response from Chief Judge Weber that he would "order a submission of a plan forthwith and schedule the plan for prompt hearings." Nowhere did this court indicate that the action of the plaintiffs was dilatory or frivolous.

Likewise, the plaintiffs' reluctant willingness to accept a tuition plan was more the result of frustration occasioned by the passage of school year after school year than it was a desire to see a tuition plan in use. Chief Judge Weber has regularly indicated to the plaintiffs that "the difficulty with. . .any . . .merger plan is what might be called community acceptance," and that a tuition plan "arouse[s] the least opposition." It is little wonder that the plaintiffs during the course of their 9½ year battle would be willing to at least have considered the use of a tuition plan. It is also not surprising that, as able and conscientious attorneys, they would refuse to accept a tuition plan, as ultimately developed, which is unconstitutional on its face because it leaves completely unremedied grades K through 6. As I view the facts and history of this case, the plaintiffs have been flexible and willing to consider any alternative that might result in an effective remedy. In turn, they have been met be delay and inaction on the part of the court and defendants.

D.

THE 90-DAY REQUIREMENT

Finally, Judge Garth argues that, even if some time limitation is proper, 90-days is too short. I believe that the order is entirely appropriate and reasonable under the circumstances

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U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). The district court's granting of two major extensions to the Commonwealth when the latter failed to discharge its duties under the 45-day order cannot be attributed in any way to the plaintiffs.

of this case. Most of the factual issues have been litigated and the legal issues briefed.[8] From its experience with the case for nearly ten years, the district court is also intimately familar with the various options.

The need for a 90-day fixed time order, enforceable by mandamus if necessary, is evidenced by the failure of this court's admonition to the district court in *Hoots IV* to have a plan in place by the 1978-1979 school year. There Judge Garth wrote:

> Having concluded that the November 18, 1977 order is not appealable, we have no jurisdiction to review it and thus must dismiss the plaintiffs' appeal. We are confident that, in light of the long history of this litigation and the sensitive, constitutional nature of the relief sought, the district court will require submission of a plan forthwith and certainly within the time limits of its original order, will expedite all further proceedings, and will give priority on its calendar to consideration and implementation of the plan. This being so, it would appear that an appropriate final order can be entered by year end which will grant plaintiffs the relief to which they are entitled under the district court's order of May 15, 1973.

587 F.2d at 1351 (footnote omitted).

To anyone who believes that the civil rights of our citizens are at least as important as the business rights of corporations, the dissent's explanation as to why it may be so difficult for a judge to act within 90 days on this 9½ year-old case is absurd. Judge Garth is worried that there might be "unforeseen circumstances, illnesses, accidents, emergencies, deaths, court conflicts and the like." Typescript at 44. From my observation as a federal judge for more than 17 years, I have never found the federal courts impotent or unable to act with dispatch when important corporate or stockholder rights are involved.

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[8]For example, the Milliken v. Bradley, 418 U.S. 717 (1974), issue has been briefed four times before Chief Judge Weber since 1974.

Only last month, in *Kennecott Corp. v. Smith*, No. 80-2696 (3d Cir. December 17, 1980), we were willing to impose extraordinary time deadlines because of the needs of two corporations in a sixteen million dollar tender offer battle. On November 15, 1980, the district court in that case denied a motion by *Kennecott* for a preliminary injuction and vacation of a temporary restraining order, thereby preventing the continuation of the tender offer. "Because of the short time requirements for tender offers established by the SEC regulations," Slip Op. at 7, this court expedited briefing and appeal, and oral argument was held on December 11. On December 17, six days after oral argument, the panel, of which Judge Garth was a member, filed a 21-page opinion reversing the district court and directing it to conduct further proceedings "as expeditiously as possible." Slip Op. at 21 n.11. Normally, under the IOP's of our court, a judge must circulate a draft opinion to the active judges for eight days before it can be filed. IOP, Chapter IX(A)(3). In *Kennecott*, because of the importance of time to the corporations involved in the tender offer, this court held an expedited oral argument sixteen days after the district court's decision, and filed the opinion six days after that argument.[9]

If in corporate cases this court is willing to expedite its own procedures so dramatically to reduce judicial consideration by several months, I fail to understand why we may not

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[9]The opinion of the court in *Kennecott* repeatedly stresses the critical need to avoid delay when courts are issuing injunctions in tender offer battles. Delay would have "detrimental effects on the stock market" and undermine the "market approach of the Williams Act." Slip Op. at 16, 18. An evidentiary hearing to determine the impact of delay was held to be unwarranted because, as found by Congress in passing the Williams Act, "it would not be possible to recast the balance between incumbent and challenger." Slip Op. at 19. The dissent finds *Kennecott* distinguishable because it involves the Court of Appeals placing a time limitation on itself, rather than on the district court. Typescript at 53-54. *Kennecott* is cited, however, to refute the dissent's proposition that, assuming time limitations are proper, the court's workload makes a 90-day deadline unreasonable.

require a district court judge to decide a civil rights case in three months when he has had it for almost ten years.

II.

The Intrusion Upon Judicial Independence

In the final analysis Judge Garth's ultimate conclusion is that "we have committed an almost unprecedented intrusion upon judicial independence." Typescript at 45. He cites only one case to explain why this is true—*Chandler v. Judicial Council*, 398 U.S. 74 (1970). *Chandler* involved a tragic case of a district judge who was cantankerous to the extreme and in all probability mentally ill. As Justice Douglas commented, the *Chandler* "case has been and continues to be the liveliest, most controversial contest involving a federal judge in modern United States history." 398 U.S. at 130. There the Judicial Council of the Tenth Circuit had, because of "the attitude and conduct of Judge Chandler," found that he was "unable, or unwilling, to discharge efficiently the duties of his office; that a change must be made in the division of business and the assignment of cases in the Western District of Oklahoma;" and that for a period of time his cases had to be reassigned to other judges. 398 U.S. at 77-78. The Supreme Court denied him a writ of mandamus.

Two cases could hardly be more dissimilar. Here we are dealing with a judge who is well, competent and has not been disparaged personally or professionally. Even in *Chandler* when focusing on this problem, Chief Justice Burger observed:

> There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. *But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business.*

398 U.S. at 84 (emphasis added). Chief Justice Burger questioned whether "each judge [can] be an absolute monarch and

yet have a complex judicial system function efficiently?" 398 U.S. at 86.

The dissent asserts that this court lacks the power to impose a time limitation on a district court judge because such a step is analagous to "stripp[ing]" him of his "caseload" as in *Chandler*. I find this analogy unpersuasive. We are not depriving the district court judge of his right to hear the case, as in *Chandler*, or to fashion a remedy, as in *Lynd*. While I do not disagree with Justice Douglas' concerns about preserving the independence of the federal judiciary, bluntly, *Chandler* is totally irrelevant to the instant case.

If one is seeking more relevant philosophical expressions of Justice Douglas, I submit that the Justice's opinion in *Bell v. Maryland*, 378 U.S. 226 (1964), involving the question of whether blacks could be denied equal public accommodations in a restaurant, would be far more apt. Twelve black students had been prosecuted for criminal trespass because they dared to believe they were entitled to unsegregated service at the Hooper's Restaurant in Baltimore. In urging that the indictment must be dismissed, Justice Douglas asserted:

> We have in this case a question that is basic to our way of life and fundamental in our constitutional scheme. No question preoccupies the country more than this one; it is plainly justiciable; it presses for a decision one way or another; we should resolve it. The people should know that when filibusters occupy other forums, when oppressions are great, when the clash of authority between the individual and the State is severe, they can still get justice in the court. When we default, as we do today, the prestige of law in the life of the Nation is weakened.

378 U.S. at 244-45 (Douglas, J., concurring). If the disent's views were accepted, this court would be defaulting on its obligations and "the prestige of law in the life of the Nation [would be] weakened."

III

CONCLUSION

When dissenting in *Hoots IV,* Judge Gibbons asserted:

> On the record before us, where the very object of the appeal is to cure unconscionable delay which is causing irreparable harm, the majority's reference to "the goal of speedy justice" as a justification for dismissing it rings hollow. And as to caseload considerations, this is one of those cases in which our concern about the caseload must yield to our obligation to enforce the supremacy of federal law.

587 F.2d at 1357. Since then, two more school years have gone by and the children still have received no relief. In an attempt to be moderate and responsible, the majority today has said that the district court must make a decision within 90 days.

At some point appellate judges must be as concerned about the human and civil rights of all of our citizens as they are fearful of offending their judicial colleagues or peers. I regret that I have been compelled to write so forcefully to a dissent, which if it were adopted, could have tragic implications for the weak, the poor and the dispossessed, whose rights are often denied and who must rely on the power of the federal court for ultimate vindication.[10]

What the majority has ordered is no radical decree. It is precedent as old as the Republic. More than two centuries ago Blackstone declared "it is a general indisputable rule, that

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[10]While I recognize that reasonable persons may often disagree on substantive matters, nevertheless, and with all due respect, I believe that the reasoning of the dissent is as specious as that declared in Chief Justice Taney's lamentable and erroneous *Dred Scott* decision. There Chief Justice Taney declared that under the Declaration of Independence and the United States Constitution a black man "had no rights which the white man was bound to respect." Dred Scott v. Sanford, 60 U.S. 393, 407 (1857). For scholarly analyses of the error of the *Dred Scott* decision, *see* Fehrenbacher, *The Dred Scott Case,* (1978); Vincent C. Hopkins, Dred Scott Case (1967); Walter Ehrlich, *They Have No Rights: Dred Scott's Struggle for Freedom* (1979).

where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded." 3 Blackstone, *Commentaries* 23 (as cited in *Marbury v. Madison,* 1 Cranch 137, 163 (1803)). In *Marbury v. Madison,* 1 Cranch at 161-63, Chief Justice John Marshall asserted:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

The plaintiffs in this case are entitled "to claim the protection of the laws" because of the constitutional injuries they have sustained. After a 9½ year persistent denial of their constitutional rights, the children of Allegheny County should not have to wait for more than an additional 90 days.

GARTH, *Circuit Judge dissenting.*

I agree in large part with the majority, with its statement of historical events, with its holding that appellate jurisdiction here is predicated on 28 U.S.C. 1292(a)(1)[1] and with its remand to the district court to complete the proceedings pending before it. I also agree that this protracted litigation should be completed as speedily as possible and thus should be accorded the very highest priority.

I disagree, however, with the majority's mandate for two reasons. As to the first, which has to do with the form of the mandate, I believe that our difference is semantic. As to the second I believe that our difference is profound and significant.

I.

The majority's mandate recites "Therefore, we vacate the July 30, 1980 order of district court and remand for proceed-

[1] Hoots v. Commonwealth of Pennsylvania, 587 F.2d 1340 (3d Cir. 1978) (Hoots IV) disposes of any contention that the order from which this appeal is taken could be the predicate for final order jurisdiction under 28 U.S.C. §1291.

ings consistent with this opinion. The mandate of this court shall issue forthwith." (maj. op. typescript at p. 17) In its prior paragraph, the majority states "...we order the district court to expedite its consideration of this case so that within ninety days of the issuance of the mandate of this court it shall:

1) complete all hearings and necessary proceedings on the merits of the competing remedial plans for the desegregation of GBASD;
2) decide the *Milliken v. Bradley* issue of which school districts may be included within an inter-district remedy; and
3) enter an appropriate final order granting appellants the relief to which they are entitled under the district court's order of May 15, 1973, such relief to be effective and implemented by the beginning of the first semester of the school year in the fall of 1981."

(footnote omitted) *Id.* at 20.

The majority thus incorporates within its mandate a 90 day time limit.

My first dispute with the mandate is that some may regard this mandate as a *reversal* of the district court order rather than as an *affirmance,* which it is. Indeed Judge Higginbotham, himself a member of the majority discusses in Part I B of his concurring opinion, not the problem that I have raised of a 90 day limit, but rather the reactions of a district court judge when he is reversed.

In point of fact and law, the majority *affirmed* Judge Weber's order of July 30, 1980. That order, which I reproduce in full in the margin, decreed the following:[1a]

[1a] ORDER

AND NOW, this 30th day of July, 1980, it is HEREBY ORDERED and DECREED that:

1. Plaintiffs' request of July 30, 1980, that the Tuition Plan and the tuition concept be rejected forthwith is DENIED, without prejudice to its renewal at the end of the hearing on said Plan.

2. Plaintiffs' request of July 30, 1980, that this Court grant them an injunction affording them merger, or consolidation relief beginning in the fall of 1980 is DENIED, without prejudice.

(1) It denied the plaintiffs' request that the Tuition Plan and the tuition concept be rejected forthwith;

(2) It did so without prejudice to renewal of the hearings on the Tuition Plan;

(3) It denied the plaintiffs' request for an injunction "affording them merger, or consolidation relief beginning in the Fall of 1980";

(4) And it denied that injunction without prejudice.

What does the majority mandate do with respect to this order? It purports to vacate it! And then it remands for proceedings consistent with the majority opinion. And what does the majority opinion require? It requires precisely that which Chief Judge Weber provided in his July 30, 1980 order.

It requires the completion of "all hearings and necessary proceedings on the merits of the competing remedial plans" (maj. op. p. 16) a reference which obviously includes the Tuition Plan. I say "obviously", because in Paragraph 31 of the majority opinion, the majority recites quite explicitly "We decline to grant appellants' request that we require the implementation of merger or consolidation relief. We also decline at this time, to reject the concept of a Tuition Plan for GBASD. The primary duty to choose between these competing remedial plans rests with the district court." (maj. op. p. 16)

Thus, as I understand it, and I consider myself a member of the majority for all purposes other than subscribing to the 90 day deadline, we have *affirmed* and not *reversed* the district court's order of July 30, 1980. By having cast our mandate in the form of "vacating and remanding" it appears to me that we have given an ambiguous direction, but one which has the same effect as a mandate which "affirms and remands". What we intended, and what we have done, is to affirm the actions and order of the district court. We have then directed that the action be remanded to the district court to continue and complete the proceedings—the very action which the district court by its July 30, 1980 order contemplated and decreed.

Accordingly, so much of the concurring opinion which speaks to the issue of reversal and which interprets what I have said in this dissent as implicating reversals of district court orders, is without foundation and is irrelevant.

II.

My second and more fundamental dispute with the mandate is that it incorporates within it a 90 day deadline which it imposes upon the district court. Those few words "within 90 days of the issuance of the mandate" carry the seeds of great mischief and potential disruption.

Because of the significant implications which this latter portion of the mandate has, I will devote virtually the whole of this dissent to demonstrating that we have no power to issue such an order; that such an order is unwise and inadvisable even if we had that power (and we do not); and if we sought to exercise this non-existent power we would have no means to enforce compliance with our orders.

The majority's mandate imposes a 90 day deadline upon the district court, (maj. op. p. 17). During that time, the district court must complete on order from our court, all matters and hearings pertaining to *all* plans and *all* proceedings. All issues, including the difficult and complicated *Milliken v. Bradley*[2] issue must be resolved by the district court, and an appropriate order entered so that a remedial plan may be implemented in time for the school term commencing September, 1981. In this opinion, I address myself only to the advisability, propriety

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[2]The Milliken v. Bradley, 418 U.S. 717 (1974) (Milliken I) issue, which the district court must resolve, involves the question of which districts are to be included in a remedial plan. For example, the Churchill district has steadfastly maintained the under *Milliken I*, it cannot be regarded in the same fashion as those districts which were created simultaneously with the General Braddock Area School District. *See Hoots IV* at 1342 n.5. The district court has ordered briefing on this issue, but it is unclear whether evidentiary hearings must still follow. The resolution of this issue is apparently the key to any interdistrict remedy.

and power of the judges of this court to order another federal judge, in this case Chief Judge Weber of the Western District of Pennsylvania, to perform his judicial functions under a 90 day deadline.

I dissent from the majority in this regard because:

(1) Even if Chief Judge Weber had been the cause of the delays which have plagued this litigation (which he has not), I know of no power available to us to impose upon him, such a sanction or order. (*see* discussion at p. 36, *infra.*)[3]

A fair analysis of the litigation to this point reveals clearly that any delays that have been suffered have come about not because of Chief Judge Weber's actions or inactions, but because of the litigants' changing positions and improvident detours through this Court. Thus, in my view, even apart from considerations concerning our *power* to impose a 90 day order, any deadline order which decrees that the burden of compliance be placed on Chief Judge Weber, is misconceived and misdirected.

(2) I firmly believe that it is inadvisable, unseemly, injudicious, improper and unrealistic to establish, by order, any time frame in which a district court judge must perform his judicial functions. An order such as this one can only lead to resentment on the part of one of the most diligent, conscientious, and hard-working judicial cadres—the district court judges—in this country. Moreover, an order such as this one, which could, but hopefully will not, lead to other orders of this character must in the long run rupture the sensitive relationship among court members of different judicial echelons and indeed may well be regarded by many of them as demeaning and even insulting.

(3) I know of no power by which we can assert the right to impose such an order and once imposed, enforce

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[3]The majority, as I do, recognizes, as it must, that Chief Judge Weber has "valiantly and ably wrestled with the complex issues of this case since 1971," (maj. op. p. 17, n.25).

such an order if compliance does not result. I deliberately do not address the subject of wilful non-compliance, because I do not believe that any district court judge, no matter what his reaction to such an order might be, would wilfully refuse to meet a deadline ordered by a higher court. Thus, I am not suggesting that a failure to comply would be wilful. I am fearful, however, that the requirements of the Speedy Trial Act compounded by the exigencies of the normal district court civil calendar[4] which these days is crowded by competition for priority among different categories of statutory and constitutional cases, to say nothing of emergency applications and preliminary injunction proceedings and the fact that the district courts' jury and non-jury calendars are planned months in advance—all militate against the probability that the 90 day mandate will be met. My fear is even greater in this particular case, because I recognize that Chief Judge Weber, in addition to the multitude of judicial matters to which he must attend as a functioning district court judge, must also deal with a multitude of intra-district administrative problems of not inconsiderable dimensions.

1. *The Litigation Giving Rise to the 90 Day Mandate.*

The majority opinion adequately and accurately sets forth the chronology of this action. To put my observations concerning the 90 day mandate in proper perspective, however, I think something more must be said respecting the reasons that this litigation has taken the length of time that it has. I do not intend to mention or dwell upon every aspect of this case, but I believe it is important to recognize that many, many months

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[4]The 1980 Annual Report of the Director of the Administrative Office of the United States Courts notes that in 1980 civil cases filed in the U.S. district courts have continued to rise to a point that the filings were more than 9% above the 154,666 cases filed in 1979, and 93.3% over the civil filings reported in 1970. As of June 30, 1980 pending civil cases numbered 186,113, more than 8,000 over the number recorded one year earlier (p. 2-3).

have literally been wasted by at least two improvident appeals[5] and the recent decision of the plaintiffs to change direction in midstream. It must be remembered that the plaintiffs unremittingly urged the consideration of a Tuition Plan and then abruptly, after many months, reversed their position and argued for its rejection.

The *Hoots IV* appeal, 587 F.2d 1340, was taken from an order of the district court entered in 1977. *Hoots IV* did no more than deny the appealability of an order refusing to implement a particular plan, without prejudice to the submission of additional plans. Thereafter, as the majority opinion observes, the plaintiffs sought the submission and approval of a Tuition Plan which they desired the Commonwealth to prepare and submit. Indeed, the plaintiffs went so far as to file an application for a Writ of Mandamus which asked this court to order the district court "to direct the state defendants to submit another interdistrict plan which would involve the *use of tuition* as a technique to remedy the problem ... " (emphasis added). Within a month the direct court ordered that the Commonwealth prepare and file a Tuition Voucher Plan. Hearings were commenced. Approximately one year later and while these hearings were still proceeding, the plaintiffs apparently had a change of heart, which was evidently prompted by the addition of new counsel. At this time, despite their earlier insistence upon a Tuition Plan, they now argued to have the Tuition Plan rejected. When this was denied by the district

[5] I do not take the position that the plaintiffs did not have the right to appeal. All litigants have the right to do what they believe is best in order to further their interests and that includes taking appeals to this court, even when in so doing, substantial delays in the ultimate resolution of their problems ensue. I do mean to emphasize that the delays which the majority now seeks to attribute to the district court, even though it transparently disclaims that intention in its footnote 25, are delays wholly caused by litigational strategies. Thus, if a generation of school children has gone through the school system in this district under circumstances which have violated their constitutional rights, that delay may not be attributed to Chief Judge Weber.

court, the plaintiffs once again appealed to this Court. They did so despite the fact that the district court had not concluded the hearings and therefore had neither recommended nor disapproved the Tuition Plan nor any other plan which was "waiting in the wings."

While I am sure that the majority would disclaim any intent to criticize the district court, my reading of its mandate leaves no doubt but that by its very nature, criticism is implied. It is evident that during the periods of time when appeals were proceeding before our court, the district court could take no action.[6] Nor can the district court be faulted for seeking to complete the hearings that it had started and for refusing the commence simultaneously a different set of hearings involving an inter-district consolidation plan, until after it had completed taking evidence on the Tuition Plan.

I am satisfied that Chief Judge Weber is as concerned about the school children in the General Braddock Area School District as are we. I am convinced that he is as disturbed and upset over the length of these protracted proceedings as are we. There can be no question that he deplores, as do we, the fact that these school children have been obliged to endure schooling in what has been acknowledged as an unconstitutional environment, and that they are victims of the delays which have been caused by some of the circumstances which I have underscored. I am also convinced that Chief Judge Weber would be overjoyed if he could put the final touches to all these proceedings, not within 90 days, but even earlier, if such were possible. I can think of no one more than he who would want to be relieved of these very considerable issues by their resolution. I am certain that even without our suggestions, he has placed and will continue to place these hearings and this litigation on

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[6]Despite the fact that jurisdiction of these proceedings was in this Court, we note that during the pendency of this appeal, the district court in an effort to conclude these proceedings, *did,* in fact, continue them at least through November 13.

his court's "most front burner", and I am equally certain that there would be no one more pleased than he if a plan were in place in time for implementation by September, 1981. However to achieve that goal, it is not necessary to "order" his court to complete what is "uncompletable" within an arbitrary and artificial timeframe. It is this subject that I address next.

2. *The Wisdom of a 90 day Mandate.*

Passing over for the moment the very critical issue of whether this court has the *power* to order Chief Judge Weber to comply with its mandate, I observe that by imposing a time limit on a district court judge, this court has usurped unto itself the district court's scheduling functions, a matter which has traditionally and necessarily been committed solely to the district court.

As a former district court judge, I know the pressures under which district court judges operate and the very careful and meticulous scheduling of their cases. Jury cases are scheduled months in advance. So indeed are non-jury matters, although in some instances these can be squeezed into the open days or hours that occur when a jury trial or other proceeding is unexpectedly terminated or recessed. Moreover, with the dismissal sanction now in force under the Speedy Trial Act, a forced reorganization of a district court schedule could result in serious consequences leading possibly to the discharge of criminal defendants whose trials were not timely commenced. Interwoven throughout this complex of judicial functions are the multitude of motions, emergency and otherwise, which must be heard and decided; sentencings, preliminary hearings, and the preparation of opinions,—yes, and in many cases, service on this very Court of Appeals when our manpower needs have required it. Indeed, Chief Judge Weber sat as a member of a panel of this court within the past few months and is accordingly responsible for the opinions assigned to him which were generated by that sitting. In his particular case as

Chief Judge. I have earlier noted that he must attend to many administrative matters from which other judges are freed.

I detail this listing, which is incomplete by far, only to illustrate the impracticality of ordering a district court judge to perform his tasks in a sound, conscientious, thoughtful and knowledgeable manner, limited however to a specific period of time, such as 90 days. I note for instance that this very appeal which was argued on November 3rd has taken more than 60 days to resolve by written opinion, and we, unlike the district court, had no evidentiary hearings, with all the uncertainties to which they are heir, confronting us. I would not like to hazard a guess as to the reactions of my colleagues on this court, if another court having the same lack of knowledge of our responsibilities and schedules as we have respecting Chief Judge Weber's responsibilities and schedule, ordered us to complete a highly complicated hearing and file an opinion for ultimate implementation within a deadline of a limited number of days.

To this point I have not even mentioned those unforeseen circumstances, illness, accidents, emergencies, deaths, court conflicts, and the like, which could add to the time needed to complete the hearings and resolutions mandated to be completed within 90 days. I note only the profound practical considerations which up to this time have restrained Courts of Appeals from intruding upon the functions of the district court.

I have gone into some detail in setting forth these matters because I want to emphasize how very unrealistic and inadvisable this court's mandate is. Hopefully, Chief Judge Weber will complete the tasks which the majority opinion requires him to complete, and will do so within 90 days.[7] If he cannot because

[7]The same evils that lurk in a 90 day mandate are equally present in a mandate specifying any particular deadline. Thus I would have the same objection if the mandate here limited the district court in the discharge of its functions to 120 days, 200 days or 240 days, etc.

of his other commitments or because of the nature of the proceedings themselves, does he then transfer *Hoots* to another judge in the Western district, thereby losing his "investment" of some eight years? And if they may be the result of the 90 day mandate, is it realistic to assume that a new judge will have a plan in place for the September 1981 term? My own view of this matter is that intricate scheduling, such as is involved here, ought not to be supervised from the far reaches of a Court of Appeals chambers. Some cases take longer than others to complete, just by their very nature. If indeed this is one of those cases, then I suggest that less harm and mischief will result if we properly permit the district court to adjust its own schedule, once that court has been advised that the highest priority should be given to this case.

3. *Enforcement.*

I have attempted to explain why the history of this litigation and the inherent functions of the district court make it impractical and inadvisable for us to set a specific time limit for the discharge of particular district court functions. Until this point I have not referred to *our power* to order the district court to perform these functions within a timeframe. I am convinced that we have no such power, and any attempt to exercise such a non-existent supervisory power can only result in embarrassment or disaster. Thus by having ordered this district court judge to perform and complete all *Hoots* matters pending before him in no longer than 90 days we have committed an almost unprecedented intrusion upon judicial independence.[8]

[8]I know of no other instance, in this Circuit, when an order was fashioned with a specific time limit. Even in Kelley v. Metropolitan County Board of Education of Nashville, Tennessee, 436 F.2d 856 (6th Cir. 1970), a case relied upon by the dissent in *Hoots IV*, no such deadline mandate was imposed. *Kelley*, which held that final order appellate jurisdiction vested in an appellate court under the circumstances of that case, involved school segregation issues that had lingered for fifteen years, *id.* at 858, and had been

(continued)

Justice Douglas, dissenting in *Chandler v. Judicial Council,* 398 U.S. 74 (1970) referred to this very subject. He did so in the context of an action brought by a district court judge who had his caseload stripped from him because he was unable or unwilling to discharge efficiently the duties of his office. Judge Chandler was not directed, as the majority has directed Chief Judge Weber, to perform discretionary functions within a specified time limit. In the course of his dissenting opinion, Justice Douglas made this observations which are every bit as pertinent today:

> An independent judiciary is one of this Nation's outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign. But neither one alone nor any number banded together can act as censor and place sanctions on him. Under the Constitution the only leverage that can be asserted against him is impeachment, where pursuant to a resolution passed by the House, he is tried by the Senate, sitting as a jury. Art. I, §2 and §3. Our tradition even bars political impeachments as evidenced

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subject to an order which stayed all proceedings for an indefinite time. Yet, even in that egregious circumstance, no specific time limit was mandated during which the district court was to perform its functions.

The majority opinion here, however, calls attention to Anderson v. Dougherty County Board of Education, 609 F.2d 225 (5th Cir. 1980), in which a sixty day time limit was imposed on the district court.

My chambers was orally advised by the Fifth Circuit clerk's office that argument in *Anderson* was held on November 6, 1979. The opinion was filed on January 7, 1980. Thus, as it has in this case, it took the Court of Appeals about sixty days to prepare, draft, and file its own opinion.

I believe that the order entered in *Anderson* is as improvident and improper as the order entered here. I note that nothing appears in the *Anderson* opinion, or by the *Anderson* panel members, commenting on this aspect of the mandate. And so it is impossible to tell whether that mandate would have issued in its sixty day form had the considerations which I urge here been called to that court's attention. I believe that had the panel there focused on the matters with which I express concern, that court may well have eschewed the 60 day time limit in its mandate.

by the highly partisan, but unsuccessful, effort to oust Justice Samuel Chase of this Court in 1805. The Impeachment Provision of the Constitution indeed provides for the removal of "Officers of the United States," which includes judges, on "Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Art. II, §4.

What the Judicial Council did when it ordered petitioner to "take no action whatsoever in any case or proceeding now or hereafter pending" in his court was to do what only the Court of Impeachment can do. If the business of the federal courts needs administrative oversight, the flow of cases can be regulated. Some judges work more slowly than others; some cases may take months while others take hours or days. Matters of this kind may be regulated by the assignment procedure. But there is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge.

The mood of some federal judges is opposed to this view and they are active in attempting to make all federal judges walk in some uniform step. What has happened to petitioner is not a rare instance; it has happened to other federal judges who have had perhaps a more libertarian approach to the Bill of Rights than their brethren. The result is that the nonconformist has suffered greatly at the hands of his fellow judges.

The problem is not resolved by saying that only judicial administrative matters are involved. The power to keep a particular judge from sitting on a racial case, a church-and-state case, a free-press case, a search-and-seizure case, a railroad case, an antitrust case, or a union case may have profound consequences. Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and

the like. Lawyers recognize this when they talk about "shopping" for a judge; Senators recognize this when they are asked to give their "advice and consent" to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community.

There are subtle, imponderable factors which other judges should not be allowed to manipulate to further their own concept of the public good. That is the crucial issue at the heart of the present controversy.

All power is a heady thing as evidence by the increasing efforts of groups of federal judges to act as referees over other federal judges.

398 U.S. 136-37 (footnotes omitted).

Justice Douglas concluded his observations by saying:

It is time that an end be put to these efforts of federal judges to ride herd on other federal judges. This is a form of "hazing" having no place under the Constitution. Federal judges are entitled, like other people, to the full freedom of the First Amendment. If they break a law, they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress. But I search the Constitution in vain for any power of surveillance that other federal judges have over those aberrations. Some of the idosyncrasies may be displeasing to those who walk in more measured, conservative steps. But those idiosyncrasies can be of no possible constitutional concern to other federal judges.

398 U.S. 140-41 (footnote omitted).

Although these remarks were written in dissent, none of the other Justices in *Chandler* either refuted, or took issue with them. These principles lead inexorably to the conclusion that in circumstances such as are present here, we have neither the right nor any power to order Chief Judge Weber to complete his processing of this case within a time limit of 90 days. If there

is such a right or power, I do not know from whence it stems, [9] and absent such a power, there is no reason for a federal judge to give heed to our mandate.

Such a consideration, I am sure, would never cross Chief Judge Weber's mind. I am certain that all of us know, that even if he were to endanger his own health in so doing, he would make every effort to meet the time strictures which the majority, in my view, has so improvidently imposed upon him. Yet, if despite these efforts, he cannot, or does not, do we hold him in contempt? Do we subject him to some form of disciplinary proceeding? Do we remove his caseload? Do we hold a hearing and ask him to show cause why he has violated the 90 day mandate? What action can we take? And should we as a Court of Appeals point a gun without the ability to pull its trigger? I recognize that the illustration is extreme, but it conveys my feeling that one should not order what one cannot enforce. To do so can only lead to embarrassment on our part, or to put the matter colloquially, I fear we shall end up with "egg on our face." Even worse, from the standpoint of the district court, is the humiliation of being ordered to do that which is "undoable". The order itself carries with it a flavor or opprobrium and, to the extent that it implies our disapproval of the district court's prior actions, it carries with it a stigma that will be difficult to erase.

I ask additional questions. Does a mandate such as the majority has imposed anticipate that if the tasks to be accomplished cannot be completed in the judge's normal, competent, workmanlike manner, is he to rush the hearings (with all that such haste implies), skimp on the decisional processes, and produce a product which may not withstand constitutional or appellate scrutiny? If so, what have we accomplished in our efforts to expedite a school plan?

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[9] The Judicial Court Reform and Judicial Conduct and Disability Act of 1980, Pub.L.No. 96-458 which reflects, in its provisions the furthest extent to which Congress has gone in evidencing concern with judicial conduct, does not bear upon the instant situation.

Finally, even if Chief Judge Weber could, and does, accomplish the impossible and furnish us with a complete resolution of all issues within 90 days, I am convinced that this would have been accomplished in any event and without the reproach implied by the majority's direction.

III.

Before concluding this dissent I feel obliged to answer some of the irrelevant arguments found in the concurring opinion.

Unfortunately the author of the concurring opinion in his understandable zeal to solve the school problems in the General Braddock District as soon as possible, has misread both the majority opinion in which he has joined, and my dissent. Thus, he seemingly has failed to understand that the majority opinion does not reverse the district court, see pp. 35-36, *supra*, but rather affirms it. He has also failed to understand that my third reason for dissenting is *not* because I find a "90 day requirement...too restrictive", (concurring op. p. 19), but rather because I know of no means by which any such time limit may be enforced (*see* pp. 45-59, *supra*).

Finally, Judge Higginbotham fails to understand that the only disagreement I have with the majority is with its imposition of a specific deadline on a district court judge. Thus, the examples which he cites of instances where Courts of Appeal have acted themselves or have directed the district courts to engage in ministerial actions, are completely inapposite. Judge Higginbotham refers in his opinion (concurring op. p. 19) to cases where Courts of Appeals have granted injunctions at the Court of Appeals level. Such actions obviously have nothing to do with a Court of Appeals order which commands that a district court deal with discretionary and evidentiary matters within a particular time frame.

In my dissent I have not addressed the power of a Court of Appeals either to enter an order itself or to order a district

court to perform a non-discretionary ministerial act, because this case involves neither. Thus the relevance of Judge Higginbotham's observations concerning such circumstances escapes me. I note, however, that if such a circumstance was relevant, which it is not, Judge Higginbotham could have referred to this court's opinion in *Evans v. Buchanan,* 582 F.2d 750 (3d Cir. 1978), to illustrate his thesis. In *Evans, supra*, this court ordered the district court to enter a particular order, but that order had first been drafted by the Court of Appeals and nothing remained to be done except to have it entered. Had the district court failed or refused to follow our direction to perform this ministerial act, we could not have compelled it. Obviously, however, this court had the power to enter that order itself, had it become necessary. This, however, is not the situation which is at issue here.

In this case Judge Higginbotham could have voted to have an order entered by this court. He could have voted to have granted to the plaintiffs the relief that they sought and he could have voted to afford that relief at the Court of Appeals' level. And if he felt, as he evidently does, that the particular nature of this litigation is such that it required this court, rather than a district court to hold hearings or to enter a remedial order without holding hearings, he could have so voted. He did not. Rather, Judge Higginbotham joined the majority and voted to return this case to the district court so that the district court judge could continue the hearings that he, the district court judge, had ordered, and in so doing could perform his proper function of taking evidence and fashioning a remedial plan. Accordingly, Judge Higginbotham's exhortations about what has been done in other courts and what should have been done in this case totally miss the mark.

Of more concern to me than Judge Higginbotham's lack of understanding of the difference between actions taken by a Court of Appeals itself and those actions which it orders a district court to perform within a prescribed time limit, is the

assertion by Judge Higginbotham that this court has the power to supervise the activities of a district court judge in his functions and that we may exercise that power on an hour-to-hour and day-to-day basis.

I note with considerable interest that nowhere in Judge Higginbotham's opinion, however, does he furnish for our guidance and edification any authority from which this power emanates. Nor does he refute the analysis of Justice Douglas in *Chandler, supra*, (see pp. 46-48 of this dissent, *supra*) which concludes that there is *no such power* to be found anywhere in our Constitution or statutes. I assume that if Judge Higginbotham knew of such authority, he would have cited it. He does not, because none exists.

In this connection, therefore, it is of no help whatsoever to have the concurring opinion direct us to *Bell v. Maryland*, 378 U.S. 266, (concurring op. p. 32) which holds no more than that where an intervening state statute made it unlawful for restaurants to deny services to individuals because of their race, the proceeding had to be remanded to state court for reconsideration in light of that statute. Justice Douglas whose concurrence in that case urged the Court to reach the merits of the plaintiffs' claims and reverse their convictions outright, is apparently cited by Judge Higginbotham as authority for the presence of our power over district court judges.

I make two observations. Judge Higginbotham is urging us to reach the merits of the plaintiffs' claims in this case, he has abandoned that battle himself, for as I have mentioned, he has voted to affirm Chief Judge Weber's order and to remand for further proceedings. My second observation is that *Bell v. Maryland* does not even address, let alone establish, the power of a superior court over the activities and functions of district court judges. One can look long and hard through the *Bell* opinion and not find even a reference to a district court judge. This is completely understandable, as that case came before the Supreme Court from the Maryland state court. I therefore question its relevance in the instant context.

I will make just a few more comments about Judge Higginbotham's disagreement with my thesis.

First, I concede that if Judge Higginbotham had been a member of the *Hoots IV* panel, he would have agreed with Judge Gibbons' approach that the *Hoots IV* order was appealable. That was the only issue decided in *Hoots IV*, i.e., whether this court had jurisdiction of the appeal. A majority of the panel held that it did not. Thus, Judge Higginbotham's espousal of Judge Gibbons' dissent in that case reflects no more than a difference of opinion as to what constitutes a final or injunctive order from which an appeal may be taken.

Second, the concurring opinion refers to our recent *Kennecott*[10] decision as demonstrating this court's ability to deal with an emergent matter and to deal with it in a remarkably short time. Its thesis apparently is that if the Court of Appeals can operate expeditiously, there is no reason why a district court judge cannot. However, Judge Higginbotham overlooks one salient fact: what this court may do has no bearing upon what the district court does, or upon the district court's commitments, its functions and our power to order that court to conform to our dictates.

I suggest that it is illogical to extrapolate from our discussion of "delay" in *Kennecott*, the principle that we can impose a 90 day deadline in *Hoots*. Nevertheless, if someone more astute than I, can discern a relationship between the principles enunciated in the Securities Regulation case and the power to supervise a district court judge, I still find that Judge Higginbotham's concurrence in this respect defies reason. He states, "[i]f in corporate cases this court is willing to expedite its own procedures so dramatically to reduce judicial consideration by several months, I fail to understand why we may not require a district court judge to decide a case in three months when he has it for almost ten years." I can only suggest that this dissent

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[10]Kennecott Corp. v. Smith, No. 80-2696 (3d Cir. December 17, 1980).

has gone into considerable detail in order to explain why we cannot.

Third, Judge Higginbotham's references to our Internal Operating Procedures and the time limits which we have voluntarily imposed upon ourselves are as irrelevant to the issue here as his other arguments (concurring op. p. 23). I have no problem if a district court judge voluntarily imposes a deadline upon himself, any more than I have any problem with the members of our court voluntarily imposing deadlines upon themselves whether for the circulation or the preparation of their opinions, or otherwise. A problem would be presented, however, if either the Congress, or the Supreme Court, or the President, were to direct us to prepare and file all of our opinions within a specified time limit, for example, 45 days.

In the first place, they would have no power to do so. Second, it would be inadvisable. Third, there would be no means at their disposal, short of impeachment, for them to enforce such a command. Thus, there is just no logical nexus that can be perceived between a voluntary self-imposed deadline and a 90 day mandate such as the majority has imposed in this case.

Finally, I suggest, that the references made in the concurring opinion to other than the 90 day deadline imposed by the mandate, are irrelevant. Thus, I do not find it necessary to address each and every feature of the concurrence because as I have indicated, not one of them focuses on the questions to which the mandate's 90 day order has given rise:

> (1) Does this court have either statutory or constitutional power to order a district court judge to perform his judicial functions within any set period of time where the district court's functions to be performed are discretionary, evidentiary and nonministerial in character;
>
> (2) if so, from where does that power come and what are the parameters of that power;
>
> (3) even assuming the presence of this power, (a power I do not believe we have and nothing that Judge

Higginbotham has written persuades me otherwise) is it advisable and realistic to exercise that power over a district court judge and his functions; and

(4) if we have such a power and if it is advisable to exercise it, can we enforce compliance?

I have answered these questions in this dissent. I have said we do not have the power; it is not advisable to exercise the power even if we had it, and if we have the power and did act to exercise it, we could not enforce it. There is nothing that appears in Judge Higginbotham's concurring opinion which alters these conclusions.

IV.

I regret having written at such length on a subject which superficially, at least, appears to be a small part of the mandate, but which in reality has profound implications, which I believe even dwarfs the basic issues before us. Because its significance in terms of judicial independence and judicial relationships cannot be ignored, I cannot subscribe to, or let go unanswered, this aspect of the majority mandate which I regard as improvident, unadvisable, unrealistic, dangerous and unenforceable. I, for one, reject the notion that the members of this court can "arrogate to themselves" and exercise such powers over the federal district court judges, particularly since no authority to do so is to be found in our Constitution or laws. *See Chandler, supra,* p. 10 at 142 (Black, J., dissenting).

I therefore respectfully dissent from so much of the mandate as imposes a fixed period upon Chief Judge Weber for the completion of the Hoots proceedings.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2116

DOROTHY HOOTS, individually and as mother of her children JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRANCE KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated,

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA; EDWARD X. HALLENBERG, President of the Allegheny County Board of School Directors; THE ALLEGHENY COUNTY BOARD OF SCHOOL DIRECTORS; W. DEMING LEWIS, Chairman of the Pennsylvania State Board of Education; THE PENNSYLVANIA STATE BOARD OF EDUCATION; MICHAEL SULLIVAN, President of the School District of the Borough of Braddock; THE SCHOOL DISTRICT OF THE BOROUGH OF BRADDOCK; ANDREW LISYAK, President of the School Board of the School District of the Borough of Rankin; THE SCHOOL DISTRICT OF

THE BOROUGH OF RANKIN; LEO CAMPBELL, President of the School Board of the School District of the Borough of North Braddock; and THE SCHOOL DISTRICT OF THE BOROUGH OF NORTH BRADDOCK; THE ALLEGHENY INTERMEDIATE UNIT BOARD OF SCHOOL DIRECTORS AND EDWARD X. HALLENBERG, AS PRESIDENT OF THE ALLEGHENY INTERMEDIATE BOARD OF SCHOOL DIRECTORS,

Appellees

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by

Appellees

in the above entitled case havng been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is deined.

BY THE COURT,

JAMES HUNTER, III

Circuit Judge

Dated: February 25, 1981

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

In their Petition for Rehearing, the appellees again claim, as the dissent did, that a 90 day time limit "is an unprecedented intrusion" upon a district court's power. Petition for Rehearing at 10. I vote to deny the petition for the reasons stated in my prior concurring opinion and in Judge Hunter's opinion. I also point out that this court has previously been willing, when dealing with corporate litigation, to impose a more rigid time limit on a district court judge than we have imposed in the present case. In *Kohn v. American Metal Climax, Inc.*, 458 F.2d 255 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972), minority stockholders brought suit on April 8, 1970 to enjoin the amalgamation of their company and another corporation because the merger allegedly violated Section 10(b) of the Securities and Exchange Act of 1934, and Section Seven of the Clayton Act. The district court on August 12, 1970 preliminarily enjoined the amalgamation. In an order of August 31, this court amended a prior order staying the injunction, and directed that the district court "proceed promptly with the trial and disposition of this case on the merits so that it may enter its Final Judgment prior to October 29, 1970" — that is within 60 days of the court of appeals' order. The subsequent opinions of the district and appellate courts are reported at 322 F.Supp. 1331 (E.D.Pa. 1970) and 458 F.2d 255 (3d Cir. 1972). While parties may disagree on what is an appropriate time limit in a particular case, the power to impose *some* time limit is clear. Civil rights litigants have rights equal to corporate parties in assuring an expeditious disposition of their legal claims.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2116

DOROTHY HOOTS, individually and as mother of her children JANELLE HOOTS and JAMIE HOOTS; et al.
Appellants

v.

COMMONWEALTH OF PENNSYLVANIA; et al.
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
D. C. Civil No. 71-00538

Argued November 3, 1980
Before: HUNTER, GARTH and HIGGINBOTHAM,
Circuit Judges
Opinion filed January 26, 1981

ORDER TO AMEND DISSENTING OPINION

It is hereby ordered that the dissenting opinion be amended as follows:

Footnote 8, which commences on page 45 of the slip opinion and concludes on page 46 thereof is hereby amended so as to add as an addition to footnote 8, the following paragraph, which will appear after the conclusion of the present footnote:

By the same token, the unreported proceeding and order in Kohn v. American Metal Climax, Inc., 485 F.2d 255, (3d Cir.) *cert. denied,* 409 U.S. 874 (1972), to which the Opinion Sur Denial of Petition for Rehearing refers, gives no indication that the issues discussed in this dissent were ever considered or urged in connection with that order. Moreover, it is impossible to judge the context in which that unreported and thus non-precedential order, which was collateral to the reported proceedings in *Kohn,* was entered, or indeed, whether time restrictions were even at issue. Thus, that order, independent of any reasoned and published opinion, can scarcely constitute authority for this court to impose deadlines on district court judges.

BY THE COURT:

LEONARD I. GARTH
Circuit Judge

Dated: February 26, 1981

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE

UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY HOOTS, individually and as mother of her childern JANELLE HOOTS and JAMIE HOOTS, MRS. ADDRALLANCE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRANCE KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated

vs.

COMMONWEALTH OF PENNSYLVANIA: EDWARD X. HALLENBERG, President of the Allegheny County Board of School Directors; THE ALLEGHENY COUNTY BOARD OF SCHOOL DIRECTORS; W. DEMING LEWIS, Chairman of the PENNSYLVANIA STATE BOARD OF EDUCATION; MICHAEL SULLIVAN, President of the School District of the Borough of Braddock; THE SCHOOL DISTRICT OF THE BOROUGH OF BRADDOCK; ANDREW LISYAK, President

Civil Action No. 71-538

of the School Board of the School District of the Borough of Rankin; THE SCHOOL DISTRICT OF THE BOROUGH OF RANKIN, LEO CAMPBELL, President of the School Board of the School District of the Borough of North Braddock; and THE SCHOOL DISTRICT OF THE BOROUGH OF NORTH BRADDOCK; THE ALLEGHENY INTERMEDIATE UNIT BOARD OF SCHOOL DIRECTORS AND EDWARD X. HALLENBERG, AS PRESIDENT OF THE ALLEGHENY INTERMEDIATE BOARD OF SCHOOL DIRECTORS,

TURTLE CREEK AREA SCHOOL DISTRICT EDGEWOOD SCHOOL DISTRICT, WEST MIFFLIN SCHOOL DISTRICT, STEEL VALLEY SCHOOL DISTRICT, EAST ALLEGHENY SCHOOL DISTRICT, SWISSVALE AREA SCHOOL DISTRICT, CHURCHILL AREA SCHOOL DISTRICT, and GATEWAY SCHOOL DISTRICT.

OPINION

WEBER, C. J. March 5, 1981

In 1973, this court found the General Braddock Area School District was a racially segregated district, created by the Commonwealth of Pennsylvania through its state and county Boards. Since that time, the court has heard testimony on several plans designed to desegregate the school system. At this stage, however, no further decisions on an appropriate plan can be made until it is determined which, if any, of the surrounding school districts can be included in any remedy within the guidelines of *Milliken v. Bradley,* 418 U.S. 717 (1974). (Milliken I).

This was a matter set down for briefing and argument in August 1980 at the time of extensive hearings on this case. Our consideration and determination of this matter was interrupted and delayed by the abrupt change of position of plaintiffs' counsel, the interlocutory appeal which followed, and the five months' wait until the decision of the Court of Appeals on this matter. Now that it is back with this court time was required to refresh recollection and review files before determining what might have been determined in September 1980. The court has relied on the arguments made at that time and the extensive briefs filed at various points to arrive at the following conclusions.

Milliken held that a multi-district remedy was impermissible where the court has found a condition of segregation in only one district, unless it can be shown that the violation was caused by the acts of adjacent school districts.

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann,* 402 U.S., at 16. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.
>
> *Milliken v. Bradley, supra* at p. 744-45.

Before any proposed remedy can be fully considered we must review the facts of this case to determine whether an interdistrict remedy is appropriate here or whether any remedy imposed must be limited in its application to less than all of the districts joined herein. It begins to appear that there is no possible remedy that would effectively desegregate General Braddock that does not include many neighboring school districts. Because an interdistrict remedy may be the only remedy available to the court, we must review the facts of this case to determine whether such a remedy is appropriate here.

Furthermore, from the testimony produced at the hearings on the tuition plan it becomes more evident that an interdistrict remedy that does not include a broad area would be a futile judicial exercise because limiting the remedy to only some of the districts, or the adjacent districts, would enlarge the size of the segregated district because the school population in some nearby districts approaches the degree of minority concentration existing in General Braddock Area School District. The focus of the infection would metastasize; a super General Braddock Area School District would be created with the same problem. The same consideration required that we reject Plan 22-W because the inclusion of Wilkinsburg completely upset the racial balance sought.

The General Braddock Area School District was created as a result of a reorganization of school districts initiated by the Commonwealth and accomplished by three specific pieces of legislation.

Prior to 1961, the Pennsylvania Public School Code of 1949, 24 P.S. §2-251 allowed school districts to merge voluntarily. Thereafter there was a series of statutes compelling mergers. The Commonwealth first passed the Act of September 12, 1961, P.L. 1283, No. 561, 24 P.S. §2-281 et seq. [Act 561] to effectuate the state's goal of achieving comprehensive programs of education through larger school districts. Although the Act recognized voluntary merger of districts this was the first Act to set up a compulsory system of reorganization and merger and provided that each county board of school directors should prepare a plan of organization of administra-

tive units for the county for review by the State Council of Education by Jan. 1, 1963. 24 P.S. §§2-282, 2-283. *State Board of Education v. Franklin Township School District,* 209 Pa. Super. 410, 228 A.2d 221,223 (1967). Once submitted by the county board, the State Board would review the plan for approval taking into consideration certain environmental criteria, including topography, pupil population, socio-economic characteristics, facility of transportation of pupils, utilization of existing school buildings, existing administrative units, and potential population changes. 24 P.S. §2-281. After review, the State Board could reject or rewrite those plans that it did not consider "wise in the best interests of the educational system of the Commonwealth." It was further provided specifically that the State Board could not approve any plan for an administrative unit which contained a student population of less than 4,000 pupils unless the above criteria were considered and the Board found that the situation necessitated the lower student population. In no event, however, was the State Board to approve any administrative unit with less than 2,500 pupils. 24 P.S. §2-283. Once approved, the administrative units were to become operative in 1965.

At the time Act 561 was passed, the following school districts operated in central eastern Allegheny County: Wilmerding, North Versailles, Gateway, Turtle Creek, East Pittsburgh, Braddock, North Braddock, Rankin, Braddock Hills, Swissvale, Edgewood, Wilkens, and Forest Hills.[3] On May 15, 1962, before the County Board had established a plan for reorganization, Wilkens and Forest Hills areas voted to voluntarily merge into a single district known as Churchill. Churchill was later approved by the State Board on June 25, 1962. Allegheny County did submit a reorganization plan under Act 561 which was approved by the State Board, but before the effective date of 1965.

Act 299 (Act of August 8, 1963, P.L. 564, No. 299, 24 P.S. §2290 et seq.) was passed to replace Act 561. Act 299 contained

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[3]Several of these districts did not maintain their own high schools but utilized a tuition plan with neighboring districts.

the same basic provisions as Act 561, but included a three-tiered appeals process for "aggrieved" school districts. The criteria for reorganization and the minimum 4,000 pupil population provision were both carried over. Act 299, however, expressly reserved to the State and County Boards the right to reconsider its approval of previously joined districts (ones formed by voluntary merger prior to Act 299) and to be remerged into even different and larger districts. 24 P.S. §2-292. Therefore, any administrative units that had been approved under Act 561 would still come under the authority of Act 299 and the County was effectively operating from a clean slate.

Although aware of strenuous objections to the proposed plan submitted by the County Board, at its meeting on September 6, 1964, the State Board approved the following administrative units: Unit 14 (Gateway); Unit 15 (Wilkens and Forest Hills combining to form Churchill); Unit 18 (Wilmerding and North Versailles combining to Form East Allegheny) and Unit 38 (Braddock Hills, Edgewood, and Swissvale). As a result, Units 14, 15 and 18 all became operative on July 1, 1966. Unit 38 did not because Edgewood took an appeal.

Along with Unit 38, this left unapproved the racially unbalanced and controversial proposed Unit 16, which consisted of Braddock, North Braddock, Rankin, Turtle Creek, and East Pittsburgh. Since the surrounding municipalities with approved school districts were now operative, they were no longer available under any reorganization plans. This left the State few options with which to deal with Unit 16. The state chose to create new Unit 16, consisting of Braddock, North Braddock and Rankin (with a close to 40% black student population as of 1967), and new Unit 42, consisting of Turtle Creek and East Pittsburgh (with a 1.3% black student population as of 1967).

In 1968, the legislature passed Act 150 (Act of July 8, 1968, P. L. 299. No. 150, 24 P. S. §2400.1 et seq.) which superseded Act 299. This Act was simply a continuation of Act 299 and contained the same basic provisions as Act 299, except for

modified appeals procedure. Act 150 further provided that all districts that had been merged under Act 299 would not be forced to merge to form larger districts. Therefore, with nothing new to work with, the State approved Unit 16 (now called General Braddock Area School District, and Unit 42, now known as Turtle Creek, as they had been proposed under Act 299. The only change of the County Board's plan that occurred under Act 150 was that the proposed Unit 38 (Edgewood, Braddock Hills and Swissvale) was split up into two smaller districts: Edgewood, with a student population of 928, 0% black, and Swissvale and Braddock Hills, now known as Swissvale, with a student population of 2,286, 10% black. This was done in spite of the statutory criteria for the size of districts.

These school districts went into effect on July 1, 1971 and this lawsuit was filed on June 9, 1971.

In an earlier opinion in this case, *Hoots v. Commonwealth of Pennsylvania,* 359 F. Supp. 807 (1973), this court made the following conclusion of law.

> 7. The natural, foreseeable and actual effect of combining Braddock, North Braddock and Rankin into a single school district was to perpetuate, exacerbate and maximize segregation of school pupils. Such conduct constituted an act of *de jure* discrimination in violation of the Fourteenth Amendment. (citations omitted).
>
> 359 F. Supp. 807, at 823.

This constitutional violation was accomplished by the State and County Board through the reorganization process completed through Acts 561, 299, and 150. This court found specifically that the County and State Boards maximized racial segregation in the public schools by creating a school district composed of Braddock, North Braddock and Rankin. At the time the state approved such a district, no other combination of school districts in the area would have created a district with as large a percentage of non-white enrollment. (Finding of Fact No. 51, *Hoots, supra* at 819). Furthermore, the plan of organization adopted by the County and State Boards pursuant to Act 150 failed to meet many of the essential requirements of

that Act and recognized educational standards. Act 150 was not met in several ways, the most obvious of which is the disregard of the 4,000 pupil population requirement (unless a small district was required) by combining Turtle Creek and East Pittsburgh with a population of only 1,898, by combining Braddock Hills and Swissvale with an enrollment of only 1,925, and by permitting Edgewood to stand alone with an enrollment of only 928. (Findings of Fact, No. 52, *Hoots, supra,* at 819).

The court found that the State and County Boards knew or should have known that they were creating a racially segregated school district. (Finding of Fact No. 50, *Hoots, supra,* at 818.) This court also found that the school districts in the vicinity of Braddock and Rankin continually sought to avoid being included in a school district with them due to the high concentration of blacks. (Finding of Fact No. 39, *Hoots, supra,* at 816). At the time that General Braddock Area School District was approved by the State Board, alternatives to a school district composed of Braddock, North Braddock and Rankin were available that would have been more consistent with Act 150. In view of the availability of these alternatives, the decision of the County and State Boards to create General Braddock Area School District was contrary to Act 150 and the standards set forth therein. (Findings of Fact 53 and 54, *Hoots, supra,* at 820).

On the basis of all the facts, this court concluded that by combining Braddock, North Braddock and Rankin into one school district, the County and State Boards created a racially segregated school district. (Finding of Fact No. 58, *Hoots, supra,* at 820). Furthermore, this court found that "the County and State Boards devised this plan of organization of administrative units which comprised Braddock, North Braddock and Rankin into one school district to satisfy the desires of as many of the surrounding municipalities as possible to be placed in a school district which did not include Braddock and Rankin." (Finding of Fact No. 59, *Hoots, supra,* at 821.) Finally, the record contained no evidence showing that the school district boundaries established in the plan of organization of adminis-

trative units are rationally related to any legitimate purpose and the court found that those boundaries did not promote any valid state interest. (Finding of Fact No. 61, *Hoots, supra,* at 821).

On the basis of the above history of the reorganization of school district boundaries in the central eastern portion of Allegheny County pursuant to Acts 561, 299 and 150 and on the Findings of Fact of this court, particularly those laid out above, the court holds that a multi-district remedy is appropriate and permissible in this case. General Braddock Area School District was created as a result of an interdistrict violation conducted by the state during the reorganization process which included the redrawing of school district boundaries in that part of Allegheny County. *Milliken I* holds that "an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation." This case clearly falls within *Milliken I* guidelines for an inter-district remedy, since racially discriminating acts of the state have been a substantial cause of interdistrict segregation.

The neighboring school districts that argue against an interdistrict remedy base their arguments on the ground that this court has made no finding that they had any involvement in the reorganization process which would enable the court to apply any remedy to them. They claim that since they are not guilty of any specific discriminatory actions they cannot be implicated in a multidistrict remedy.

A multidistrict remedy can be applied to surrounding districts that have not been found to have committed a constitutional violation themselves where their boundaries were drawn or redrawn during the course of the same violation which created the segregated school districts. *Morrilton School District No. 32 v. United States,* 606 F.2d 222 (8th Cir. 1979), *cert. denied* 444 U. S. 1071 (1980); *Evans v. Buchanan,* 416 F. Supp. 328 (D. Del. 1976), *aff'd* 555 F.2d 373 (3d Cir. 1977; *United States v. Board of School Commissioners of the City of Indianapolis,* 451 F. 2d 1211 (7th Cir. 1976).

In the *Morrilton* case, the court found that the school district lines in Conway County followed a discriminatory pattern and ordered an interdistrict remedy. Some of the surrounding districts that would be effected by the remedy argued that since there was no evidence implicating them in a direct way, the court had no authority to order them to remedy the state's wrong. The court found this argument to be without merit since the effects of the unconstitutional state action are felt in both districts. The court went on to quote *United States v. Board of School Board Commissioners of City of Indianapolis,* 573 F.2d 400, 410 (7th Cir. 1978), *cert. denied,* 439 U.S. 824 (1978):

> [S]chool officials may not maintain that their districts should be excluded from any interdistrict remedy if they are found innocent of committing any constitutional violations because they should not be held responsible for the acts of the state legislators or other state subdivisions such as a local housing authority or a zoning board. The commands of the Fourteenth Amendment are directed at the state and cannot be avoided by a fragmentation of responsibility among various agents. *Cooper v. Aaron,* 358 U.S. 1, 15-17, 78 S.Ct. 1401, 3 L.Ed. 2d 5 (1958). If the state has contributed to the separation of the races, it has the obligation to remedy the constitutional violations. That remedy may include school districts which are its instrumentalities and which were the product of the violation.

The several opinions written in the Wilmington case, *Evans v. Buchanan, supra,* also support an interdistrict remedy in a case whose facts are similar to our own. The State of Delaware had set out a plan for reorganization and consolidation, which excluded the school district of Wilmington by a provision which limited the maximum pupil enrollment to 12,000 since Wilmington already had an enrollment of over 15,000, they were not considered for consolidation with any of the surrounding school districts. Since their non-white population was already at 66%, this had the effect of perpetuating and continuing segregation in the Wilmington schools.

The court in *Evans* found that the state had violated the constitution by acting in a manner which was a substantial and proximate cause of the existing disparity in racial enrollments in the districts of that area. They ordered a multidistrict remedy and the surrounding districts complained that they had committed no constitutional violation and should not be included in such a remedy. The court found this defense to be inadequate where the local boards are creatures of the state that had committed the violation.

> The fact that birth rates, or population shifts, or other factors also contributed to a degree will not relieve the State from its obligation to desegregate. The remedy for the violation must include school districts which are its instrumentalities and which were the product of one of the violations. The remedy for the acts of the State may be inconvenient, burdensome, and expensive to some of those instrumentalities, but neither inconvenience, burden nor expense can negate the duty of the Court to order effective relief when a not insubstantial violation has been shown.
>
> *Evans,* supra, at 339-340.

The case presently before this court, as in the cases cited above, calls for an interdistrict remedy. The State and County Boards violated the constitution in the manner in which the school district lines were drawn and so all surrounding districts can be implicated in a remedy, despite their alleged lack of involvement in the process.

> Where the State has contributed to the separation of races by redrawing school lines, necessarily the districts on both sides of the lines are part of the violation itself, and exclusion of the suburban districts cannot be predicated on their own purported innocence when their present lines were drawn or redrawn in the course of a violation.
>
> *Evans,* supra, at 340.

Neither are the surrounding districts innocent in the reorganization plan which created General Braddock. This court found that the school districts in the vicinity of Braddock and Rankin continually sought to avoid being included in a school

district with them due to the high concentration of blacks. *Hoots,* supra. Finding of Fact No. 39.

Some of the school districts also claim a particular exclusive status, allegedly given them by the state, which would exclude them from being a part of any multidistrict remedy. Churchill, and East Allegheny were approved as school districts under Act 299. When that Act was superceded by Act 150, districts approved under Act 299 were exempted from Act 150. Churchill and East Allegheny claim they were granted "grandfather status" and therefore were not implicated in the creation of General Braddock which occurred under Act 150. Edgewood claims that because its boundaries pre-existed all mergers, they were never involved in any redistricting which led to the creation of any segregated district.

This argument is without merit since the constitutional violation was not only committed under Act 150, but pursuant to the entire reorganization process that began with Act 561. Furthermore, the very elimination from consideration for merger with those districts was itself a contributing factor to the creation of a segregated school district since all the districts with a lower black student population were now excluded from any plan, leaving General Braddock Area School District in an isolated position.

Churchill argues exclusion from a remedy even further in that they had begun their voluntary merger plans back in the 1950's, before Act 561 and the state reorganization plan. It is irrelevant, however, when their current boundaries were first established. The actual vote to merge did not occur until after the passage of Act 561. The state at all times under Act 561 and Act 299 had expressly retained the power to force further merger with districts that had previously voluntarily merged. The fact that the state chose not to disrupt the new district of Churchill does not mean that the State could not have ordered them to merge again with Braddock Hills. Furthermore, it was the refusal to force such a merger, which was within the state's power, which contributed to the isolation of General Braddock.

Finally, the alleged "grandfather status" granted by Act 150 cannot eliminate any of the school districts from a future

remedial plan of this court or the State, School districts are the creation and instrumentalities of the state and have no vested rights in their boundaries. In a case challenging the ability of the state to require merger under Act 299, the Pennsylvania Supreme Court held that the legislature reserves its powers to alter school laws in all contracts made by school districts. The court found that Act 299 could alter any mergers completed under prior acts since the Public School Code of 1949 did not intend created vested rights but merely authorized the formation of school districts which would exist until changed by future legislative direction.

> The continued ability to alter the organization of the school system throughout the Commonwealth is a prerequisite to the fulfillment of the Legislature's constitutional duty to provide for the maintenance of a thorough and efficient system of public schools.
>
> * * *
>
> The jointure agreement involved here was made pursuant to the authority given to school districts to enter into such agreements with the concomitant condition inherent in such legislative authority that actions taken pursuant thereto are subject to later change by the Legislature. As was pointed out in *Dodge v. Bd. of Education,* 302 U.S. 74, 79, 58 S. Ct. 98, 100 (1937), 'the presumption is that such a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise.'
>
> *Chartiers Valley Joint Schools v. Allegheny County Board* 418 Pa. 520, 528-29 (1965).

School districts have no vested rights in their boundaries and they can be altered by the state whenever necessary. When the state has committed a constitutional violation in the use of its power, school district lines can be redrawn by the court to remedy that violation.

Edgewood also claims a sort of special status exempting it from any remedial plan since the Pennsylvania Supreme Court upheld its right to stand alone as a school district, despite its

obvious non-compliance with the student population requirements. *Edgewood Borough School District Appeal,* 445 Pa. 343 (1971). That case, however, did not specifically address the propriety of or the motivation for letting Edgewood stand alone. It did not address the segregative effect of that action at all. That case was decided on a finding that the state had not abused its discretion in approving such a school district. The court refused to interfere with administrative decisions.

This court, however, must interfere with administrative decisions which are made by the state during the course of a constitutional violation.

On the basis of the foregoing this court holds that the following school districts may be included in any remedial plan to be considered by this court: Churchill, Turtle Creek, Swissvale, East Allegheny, Edgewood, and Gateway.

Two other school districts have been added as parties to consider the nature of the remedy, West Mifflin and Steel Valley. Both these school districts are located across the Monongahela River from the others in this area of eastern central Allegheny County. They were never considered in prior merger plans. The evidence shows that there is only one bridge carrying heavy traffic connecting these two school districts with the General Braddock area. This factor would make any consolidation with West Mifflin or Steel Valley highly impractical and they are, therefore, not to be included in any remedial plan before this court. Furthermore, the evidence suggests that as to Steel Valley, the present high degree of black school attendance in that district would only spread the area of segregation, and in West Mifflin the black school population in the most adjacent school facilities shows the same pattern. Furthermore, neither Steel Valley nor West Miffflin were involved in the jointure, consolidation or merger of the school districts which eventually led to the creation of the General Braddock Area School District.

ORDER

AND NOW, this 5th day of March, 1981, IT IS ORDERED THAT further consideration of remedial plans shall be governed by the above Opinion, and the motions to dismiss of the school districts of Churchill, Turtle Creek, Edgewood, East Allegheny and Gateway are DENIED. The motions to dismiss of the school districts of Steel Valley and West Mifflin are GRANTED.

/s/ GERALD J. WEBER

GERALD J. WEBER
Chief United States District Judge

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IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY HOOTS, et al

v.

COMMONWEALTH OF PENNSYLVANIA et al.

C.A. No. 71-538

ORDER

Four of the parties have filed motions to alter, amend, or reconsider the court order of March 5, 1981. AND NOW, this 24th day of March, 1981, IT IS ORDERED that the motions to alter or amend filed by Churchill, East Allegheny, Edgewood and Turtle Creek are DENIED.

/s/ GERALD J. WEBER

GERALD J. WEBER

Chief United States District Judge

cc: All Counsel

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY HOOTS, et al.
Plaintiffs

v.

COMMONWEALTH OF PENNSYLVANIA et al.
Defendants

Civil Action No. 71-538

MEMORANDUM ORDER

After the Order of the Court of Appeals directing this court to proceed to a final determination of this matter within 90 days we began to proceed further with matters pending before us in August 1980. We proceeded to decide the second of the three part requirement imposed by the Court of Appeals at p. 17 of the slip opinion, the decision of *Milliken v. Bradley* issue of which schools may be included within an interdistrict remedy. On March 5, 1981, we issued our opinion in which we held that the Districts of Churchill, Edgewood, Swissvale, General Braddock Area, Turtle Creek, East Allegheny and Gateway may be legally included in an interdistrict remedial plan. We concluded that it was not feasible because of geography and other considerations to include the districts of Steel Valley and West Mifflin and granted the motions to dismiss as to those districts.

During this time we were also aware that the plaintiffs had engaged experts to prepare a report for the court proposing an interdistrict remedial plan. This came to our attention because of the presentation of certain motions to compel discovery. The report and recommendation of plaintiffs' experts was filed in this court on March 26, 1981, and came into the hands of this court on Saturday, March 28, 1981, and was immediately read.

On Monday, March 30, 1981 we ordered a conference of all counsel on Wednesday, April 1, 1981, to consider pending matters and determine a course of action. We heard two hours of argument and objections, suggestions and objections, proposals and objections. This Memorandum order is made on consideration of all matters raised.

On June 6, 1980, General Braddock filed an "upgrade plan." This was a very sketchy proposal to improve the quality of its schools to attract non-minority students back to the General Braddock Area schools to improve the racial balance. No testimony on this plan was taken in the extensive hearings during the summer of 1980 which were concentrated on the "tuition plan" originally urged on us by plaintiffs in their application for Mandamus of April 16, 1979, and which we ordered the Commonwealth to prepare on May 17, 1979.

On March 26, 1981, there was also filed by the General Braddock Area School District a fleshed-out version of the "upgrade plan" submitted by its experts, the Donald M. Carroll Agency. Several of the parties defendant strongly insist that we hear testimony on the Carroll plan, and also request that the court consider a further development of the plan to be submitted. We reject the Carroll plan for further consideration. The plan is intradistrict; it does not face the issue of desegregation. Only as an admitted after-thought was there added a provisin for interdistrict visits one half day each week.

We are ready for the consideration of the remedial plan proposed by plaintiffs. We are thoroughly familiar with all of the districts to be involved, we have considered other plans involving permutations and combinations of neighboring districts to the point that little can be added.

Having dismissed West Mifflin and Steel Valley Districts, we have remaining before us seven (7) districts as parties added for the purpose of a remedy.

The plaintiffs now propose a five district remedy, composed of five districts most fully covered in prior hearings. Plaintiffs do not propose the inclusion of East Allegheny and Gateway for many reasons of efficiency, area, distances and facilities. To the court's suggestion that East Allegheny and

Gateway be dropped as defendants there was only partial and moderate opposition. They will remain as parties until we have concluded the further hearings provided herein.

From all of the hearings held we are of the opinion that only an interdistrict remedy is feasible here, and we will proceed to determine the districts to be included on the basis of the HGH Associates Plan of Consolidation. We are also of the opinion that only a single new district be formed from the consolidation because of the many difficulties presented by plans of consolidation into multiple new districts on which we have heard testimony in prior hearing.

Finally, after full hearings thereon, we are satisfied that the tuition plan prepared by the Commonwealth or any amendments or modifications thereof, cannot achieve effective desegregation, and the plan is therefore rejected.

NOW, THEREFORE, IT IS ORDERED that hearings on the remedy to be ordered shall be held beginning at 9:30 a.m. Monday, April 20, 1981. The hearings shall be held solely for the purpose of determining the districts to be consolidated for the purpose of remedying the constitutional violations found to have been imposed on the plaintiffs here. The districts to be considered will be limited to General Braddock Area, Churchill Area, Swissvale Area, Edgewood, Turtle Creek Area, East Allegheny and Gateway.

No evidence or testimony will be taken as to any prior plan presented to this court.

The testimony shall be limited to the geographical area of a new school district proposed to be formed by the consolidation or merger of the above districts.

No evidence or testimony shall be presented on any aspect of administration of the newly created district, including matters of pupil assignment, staff assignment, utilization of facilities, transportation or any matter of implementation.

Due to the substantial evidence already presented and in view of the requirement of immediate relief, the hearings shall be limited as follows:

Monday, April 20, 1981. Presentation by Plaintiffs of expert testimony in support of their submitted plan.

Tuesday, April 21, 1981. Cross-examination of Plaintiffs' expert witnesses and presentation of expert testimony of Defendants.

Wednesday, April 22, 1981. Presentation of Defendants' expert testimony.

Cross-examination of Plaintiffs' expert shall be limited to three of defendants' counsel, chosen by agreement among them. Defendants shall be limited to the presentation of one witness for each party defendant.

At the close of the hearings on *Wednesday, April 22, 1981,* the court shall proceed to an order establishing the school district designate to effect the remedy.

SO ORDERED this *6th day of April, 1981.*

/s/ GERALD J. WEBER
Chief United States District Judge

cc: All counsel

ORDER OF COURT.

AND NOW, to wit, this 6th day of June, 1969, upon presentation of the Petition for Appeal and For Supersedeas, and supersedeas is hereby granted and all proceedings related to the reorganization of the School District of the Borough of Braddock are hereby stayed until final determination of this appeal; appropriate notice to be given to counsel for the State Board of Education.

BY THE COURT:
WATSON,
J.

Adjudication.

(Filed June 23, 1969.)

In Re: APPEALS OF THE SCHOOL DISTRICTS OF THE BOROUGHS OF RANKIN, BRADDOCK AND NORTH BRADDOCK FROM THE PLAN OF ORGANIZATION OF ADMINISTRATIVE UNITS SUBMITTED BY THE ALLEGHENY COUNTY BOARD OF SCHOOL DIRECTORS.

AND NOW, May 9th, 1969, the State Board of Education makes the following adjudication:

Pursuant to the mandate of the School District Reorganization Act of 1968, approved July 8, 1968 (Act 150), the Allegheny County Board of School Directors on October 7, 1968, adopted, and thereafter submitted to the State Board of Education a plan of school district reorganization for Allegheny County, which provided for the creation of Administrative Unit 16, composed as follows:

> School District of the Borough of Rankin, School District of the Borough of North Braddock and School District of the Borough of Braddock.

Each of the three districts comprising Unit 16, considering itself aggrieved by the Allegheny County Plan, has appealed to the State Board of Education to amend the Plan by establishing each district as a single administrative unit and, in addition, the School District of Rankin also petitioned, as an alternative amendment, to be combined with Unit 38.

After due notice, a hearing on said appeals was held on February 25, 1969, in Harrisburg, Pennsylvania. At the hearing, opportunity was afforded all parties in interest to offer testimony, examine and cross examine witnesses and to introduce exhibits for consideration by the Board. This adjudication is made in accordance with the Board's determination based upon the testimony, exhibits and other matter incorporated into the record of the proceedings.

FINDINGS OF FACT

1. Administrative Unit 16 is comprised of the School Districts of the Boroughs of Rankin, Braddock and North Braddock (County Plan).

2. Unit 16 has a total land area of only 2.64 square miles (County Plan).

3. The total ADM in Unit 16 for the base year 1966-1967 was 4,110 (County Plan).

4. The educational program offered in the North Braddock system will benefit the pupils in the other two districts comprising proposed Unit 16 (North Braddock N. T. 64).

5. There are no cafeteria facilities in the North Braddock School System (North Braddock N. T. 31).

6. A very low percentage of the North Braddock graduates attend degree-granting institutions (North Braddock N. T. 57).

7. The current total pupil enrollment in the Rankin School System is approximately 630 students (Rankin N. T. 6).

8. Rankin is a regressing community economically and is in desperate need of financial aid from a broader economic base (Rankin N. T. 18-20).

9. The present ADM in the Braddock School District is approximately 1,244 (Braddock N. T. 16).

10. There are no anticipated population changes in the Braddock School District (Braddock N. T. 22).

11. There are no cafeteria facilities in the Braddock system, although there are 931 children certified under Title I as being underprivileged (Braddock N. T. 46-47).

DISCUSSION

The State Board of Education is empowered under Act 150 (1968) to adopt standards to which county plans of school district reorganization must conform, but the initial burden and responsibility in selecting among possible combinations which meet these standards is reposed in the local county board of school directors.

The record establishes that Administrative Unit 16 of the Allegheny County Plan does meet the minimum mandated pupil population of 4,000. None of the three constituent districts can approach this figure individually or in combination, now or in the foreseeable future, except as in the merger proposed by the County Plan.

Topographically, no barriers appear which would militate against common administration. The need and extent, if any, for massive pupil transportation has not been adequately demonstrated. Moreover, the future utilization or nonutilization of attendance centers in the component districts is subject to the discretion of the reorganized board for determination as in the best interests of all the pupils of Unit 16. In this proposed unit there is afforded maximum flexibility in planning for future needs under a common administration.

Although each of the component school districts have distinctive and noteworthy programs, the testimony and exhibits in the record indicate that none have the capacity to provide a comprehensive program of quality education as envisioned as the legislative goal of Act 150 (1968). In this regard, the advantages of increased curricular offerings, financial savings in many areas of purchase and a broader economic base far outweigh the initial adjustments of finance, administration and personal relationships attendant upon reorganization.

The responsibility of the county board is an onerous one. It must adopt a Plan consistent with the statutory factors and our supplementing standards that provide the maximum educational benefits to every pupil of the area irrespective of whether he lives in a rich or poor district. This Board agrees that the only reasonable plan conforming to that responsibility is Administrative Unit 16.

CONCLUSION

The appeals of the School Districts of the Boroughs of Rankin, Braddock and North Braddock are denied, and Unit 16 of the Allegheny County Plan of Organization of Administrative Units is hereby approved as being in the best interests of the educational system of the Commonwealth.

DAVID H. KURTZMAN,
Chief Executive Officer.

IN THE
COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

In Re: Appeal of the School District of the Borough of Rankin from Plan of Reorganization of Administrative Units by State Board of Education Forming Unit 16	**SA 544 of 1969**
In Re: Appeal of the School District of the Borough of North Braddock from plan of Reorganization of Administrative Units by State Board of Education Forming Unit 16	**SA 556 of 1969**
In Re: Appeal of the School District of the Borough of Braddock from Plan of Reorganization of Administrative Units by State Board of Education Forming Unit 16	**SA 559 of 1969**

OPINION

McKENNA, J.

These cases arise under the School District Reorganization Act, No. 150 of July 8, 1968, P.L. (24 P.S. 2400.1, et seq.). The Act requires each County Board of School Directors in the State to submit to the State Board of Education a plan for reorganization of districts within the County. The State Board may then affirm or modify the plan. The objective of the legislature is to reduce the number of districts in the State, and to require that there be at least 4,000 students in each adminis-

trative unit. There are exceptions to this requirement, which are hereinafter noted and discussed. Administrative units must conform to certain standards promulgated by the Department of Public Instruction of the Commonwealth.

In the case at bar, the State Board, adopting a plan which had been submitted by the Board of School Directors of Allegheny County, with certain exceptions not here material, placed the School Districts of the Boroughs of Rankin, Braddock and North Braddock in a single administrative unit known as Unit 16.

Each district appealed to the State Board of Education, where each was afforded a hearing. The State Board affirmed the County plan. Further appeals were prosecuted to this Court as authorized by Act 150. The three cases were consolidated for trial purposes and were heard on February 2, 1970.

The Allegheny County plan creates twelve units containing twenty-seven school districts. Almost without exception, the school districts involved appealed to this Court from the action of the State Board approving it. The three cases captioned above were the first to be tried. Accordingly, we will state in this opinion the legal background of the proceedings and a discussion of the Constitutionality of Act No. 150. The conclusions reached here on this issue will be applicable to all of the appeals filed.

In brief, the Constitution of Pennsylvania places on the General Assembly the obligation to provide for the maintenance and support of a public school system in the Commonwealth. In 1949, the legislature adopted a public school code governing all phases of education. This provides that each municipality in the Commonwealth shall constitute a separate school district, and it classifies them according to population into five categories. In 1961, the legislature first stated its goal of having at least 4,000 pupils in each administrative unit. The 1961 Act was replaced by that of 1963, whilch in turn was superseded by the 1968 statute. Each of these was an amendment of the school code of 1949. In order to create districts with the required pupil population, it was necessary to combine several into one. This action provoked much controversy.

Parents were understandably reluctant to permit the important matter of education to be administered by persons outside of their own communities. They are distrustful of change. Not all educators accept the principle that a larger district promotes efficiency, to which this Commonwealth adheres.

The Constitutional and statutory provisions and the procedures in the case at bar are hereinafter stated in more detail.

The Constitution of 1874, Article X, section 1, reads in part as follows:

> "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools"...

Prior to this date, education was provided by local districts. This system had been in operation for forty years, and yet, it appeared that a large percentage of adult Pennsylvanians were illiterate. Accordingly, the Constitutional provision was adopted. (See *School District of Beallsville,* 21 C.C. 642, 1897)

The above section was replaced by Article III, section 14 of the 1969 Amendment to the Constitution, which reads:

> "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth."

By Act of May 18, 1911, P.L. 309, the legislature established a public school system. This was succeeded by the Public School Code of March 10, 1949, P.L. 30 (24 P.S. 1-101, et. seq.), which adopts a comprehensive plan of education in the State. This, as has been noted, provides that each municipality shall constitute a separate district (24 P.S. 2-201). It classifies them according to population, bestows on them powers and duties, and authorizes mergers into "Union School Districts".

By Act of September 12, 1961, P.L. 1283, No. 561 (24 P.S. 2-281), the legislature provides for the reorganization of school districts. This requires the State Council of Education to adopt standards for administrative units prior to January 1, 1962. Each County Board of School Directors is compelled to submit a plan to the Department of Public Instruction prior to

January 1, 1963. The Act provides that no plan shall be approved in which any proposed unit contains less than 4,000 pupils, unless factors of topography, pupil population, socio-economic characteristics, facility of transportation of pupils, utilization of existing school buildings, existing administrative units and potential population changes are considered by the State Council to warrant a smaller unit.

This Act contained no right of appeal. It was replaced by the Act of August 10, 1963, P.L. 564, No. 299. Section 290 of this Act contains a detailed statement of its purpose. This we consider to be an important feature of the law, and we quote it as follows:

> "The purpose of this subdivision is to provide a flexible framework and effective and orderly means whereby the administrative units of the Commonwealth's public school system can be expeditiously reorganized. While deeply impressed with the continuous dedicated responsibility exercised over the last century by the citizenry through their local boards of school directors, the General Assembly must also be cognizant of the responsibility placed upon it by Article X., section 1 of the Constitution of Pennsylvania which requires in part, that 'The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of the Commonwealth above the age of six years may be educated . . .' As the evidence demonstrates beyond reasonable dispute that the present administrative system of more than two thousand (2,000) school districts is incapable of providing adequate education and appropriate training for all of the children of the Commonwealth above the age of six, the General Assembly hereby renews its dedication to its responsibility of providing a thorough and efficient system of public schools within the Commonwealth. It is hereby declared to be the purpose and intention of the General Assembly to establish the procedures and provide for the standards and criteria under which school directors and district

administrators and county boards of school directors and county administrators shall have the power and bear the duty of determining the appropriate administrative units to be created in each county to carry out the responsibilities shared by them and the General Assembly, of educating and training each child within his capacity to the extent demanded by the immediate requirements of growth and strengthening of this Commonwealth and nation. Only where such local officials fail to act, or act arbitrarily outside of the standards and criteria provided for in the sections following, shall the Commonwealth through its duly authorized agencies and officials act to insure compliance with law within the powers set forth below and as restricted therein. The improvements in the educational system hereby obtained are not to be construed as a final resolution of organizational problems. Local school officials as agents of the General Assembly are directed to continually review organizational patterns and adopt without delay all changes which accelerate the progress of public education. It is further declared to be the purpose and intention of the General Assembly that the above may be used in construing and arriving at legislative intent with respect to the provisions of this subdivision."

This Act also requires the State Board of Education to adopt standards and County Boards to submit plans. Again, it provides for a pupil population of at least 4,000 in each administrative unit, with the proviso for smaller units, as expressed in the Act of 1961. The statute contains this clause (24 P.S. 2-293(b):

"A plan of organization of administrative units for a county *shall be approved* by the Council of Basic Education, *if the plan contains (1) no unit with a pupil population less than that of the unit with the smallest pupil population in the last previous county wide plan* submitted to and approved by the State Council of Education prior to September 12, 1961"...(emphasis added)

Also, this paragraph in section 296:

"On July 1, 1966 or on the date of advance establishment, all administrative units contained in plans of organization of administrative units approved by the Council of Basic Education shall constitute and be deemed established as school districts, and shall belong to the class to which they are entitled as provided by law:"...(24 P.S. 2-296)

Appeals to the State Board of Education are allowed by the Act and further appeals to the Dauphin County Court under the Administrative Agency Law.

That Court became flooded with such appeals, and the 1963 statute was replaced by Act No. 150 of July 8, 1968, P.L. (24 P.S. 2400.1, et. seq.). This provides that:

"The State Board of Education within 30 days of the effective date of this act, shall adopt standards for approval of administrtive units comprised of those school districts which are not in an administrative unit established as a school district under section 296 of the Act of March 10, 1949 (P.L. 30) as amended"...(Act 299 of 1963, 24 P.S. 2-296).

It has been alleged herein that this section renders Act 150 unconstitutional and void, since it does not apply to all districts in the Commonwealth, but only to those not in an administrative unit established under prior law. We will discuss this question first, since, if the law is void there will be no need to consider the merits of the case.

CONSTITUTIONALITY OF ACT 150

This Act has been held unconstitutional in two opinions from the Court of Comon Pleas of Crawford County. *In the matter of the Appeal of Borough of Cambridge Springs School District, et. al.,* Nos. 146-149 inclusive, February Term, 1969, the Honorable F. Joseph Thomas, in an opinion dated February 2, 1970, held the statute invalid. Also, in an opinion of the same date, President Judge P. Richard Thomas reached this result in the case of *Appeal of School District of Sparta Merged,* No. 151 May Term, 1969. The bases for these opin-

ions is that the Act contravenes Article III, section 32 of the Pennsylvania Constitution prohibiting special legislation; and that it violates the *Statutory Construction Act* of May 28, 1937, P.L. 1019, section 96 (49 P.S. 596).

The Pennsylvania Constitution, as amended to January 1, 1969, provides in part as follows, Article III, section 32:

> "The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically, The General Assembly shall not pass any local or special law: (1) regulating the affairs of counties, cities, townships, wards, boroughs or school districts."

President Judge Thomas held Act 150 unconstitutional on the ground that it is special legislation. It applies only to those school districts which are not in an administrative unit established as a school district under section 296 of the Act of March 10, 1949, P.L. 30, as amended; (i.e. Act 299 of 1963).

The Honorable F. Joseph Thomas in the *Cambridge Springs School District* case, reached the same conclusion as did his colleague in thje *Sparta* case.

A consideration of the various statutes governing reorganization indicates that the legislature adopted a consistent pattern of rules. The *School Code of March 10, 1949* P.L. 30 section 201 (24 P.S. 2-201), provides in part as follows:

> "All school districts shall remain as now constituted until changed as authorized by this Act. Except as otherwise now or hereafter constituted, each city, corporate town, borough or township in this Commonwealth not existing of hereafter created shall constitute a separate school district"...

This Act provided for mergers (section 261), and in section 262 it directed that each county should submit a plan for the reorganization of school districts therein. However, the provision for 4,000 pupils in each district first appears in the 1961 statute.

By Act of September 12, 1961, P.L. 1283, No. 561 (24 P.S. 2-283), each county board is required to submit a plan for the

organization of administrative units, each to contain at least 4,000 pupils, unless factors of topography, pupil population, socio-economic characteristics facility of transportation of pupils, utilization of existing school buildings, existing administrative units and potential population changes dictate a lesser number. This Act did not bring about the result desired and was much criticized, particularly on the ground it contained no right of appeal. It was superseded by Act 299 of August 8, 1963, P.L. 564 (24 P.S. 2-290, et. seq.). This statute is confusing, and at least one section is susceptible of more than one construction. Its provisions are thoroughly analyzed in an opinion by President Judge Ervin of the Superior Court in the case of *State Board of Education v. Franklin Twp. Sch. Dist.*, 209 Pa. Super. 410 (1967).

Section 293(a) of Act 299 of 1963, provides that County plans shall be submitted to the Council of Basic Education. The Council is directed to approve such plans as it deems wise. No plan is to be approved if it contains less than 4,000 pupils, unless considerations of topographgy, etc. warrant a smaller unit. Subsection (b) as quoted below, provides that a plan shall be approved if it contains no unit with a pupil population less that of the unit with the smallest pupil population approved prior to September 12, 1961.

Section 295 provides that a school district which considers itself aggrieved by a plan or organization of administrative units approved by the Council of Basic Education may appeal to the State Board of Education, which is authorized to either approve or amend the plan. Further appeals are allowed to the Dauphin County Court under the provisions of the "Administrative Agency Law". Section 296 also quoted above provides that units contained in plans approved under prior law shall be deemed to be established districts.

Section 297 reads in part:

"(a) Any administrative unit contained in a plan of organization of administrative units approved by the Council of Basic Education may constitute and be deemed established as a school district on July 1, 1964, or on July 1,

1965 when the following conditions have been satisfied: (1) All appeals to the State Board of Education from the Council of Basic Education approving the plan of organization of administrative units have been finally determined"...

It will be noted that section 293(b) is mandatory. It *directs* the Council of Basic Education to approve a plan which contains no unit with a pupil population less than that of the unit with the smallest pupil population in the last previous county wide plan approved by the Council of Basic Education prior to September 12, 1961. Yet decisions of the Council may be appealed to the State Board of Education, and thence further to the Dauphin County Court. The question arises as to whether appeals lie from decisions made under subsection 293(b), since its provisions are mandatory. President Judge Ervin held in *State Board of Ed. v. Franklin Twp. Sch. Dist.*, 209 Pa. Super. 410 (1967), that appeals do lie to the State Board from decisions made under subsection (a) or (b) of section 239 of the Act of 1963. And, of course, further appeals lie to the Dauphin County Court.

In the Crawford County cases, it is held that the provisions of section 293(b) are mandatory, and that if any unit could show that it had at least as many pupils as a certain type of unit organized prior to September 12, 1961, it had an absolute right to exist.

Act No. 150 of 1968 provides for the reorganization of all units, except those organized under the Act of 1963. The Crawford County cases hold this to be special legislation, and therefore unconstitutional and void. It appears in the *Sparta* case, that that district was included in an Erie County plan and attached to Corry Area. Sparta appealed to the State Board of Education. It was there unsuccessful, and an appeal was taken to the Commonwealth Court. The appeal was pending in that Court when Act 150 was passed. The Commonwealth Court dismissed the appeal as moot. Sparta was then merged with other districts under Act 150. It appealed from the order of merger to the Crawford County Court of Common Pleas

under the provisions of section 5 of Act 150. That Court held Act 150 to be special legislation, unconstitutional and void on this ground: that other units in Erie County contained less than 4,000 pupils, but were approved because they contained at least as many as were in the smallest unit organized prior to September 12, 1961, i.e. the School Code of 1949, as amended in 1953. The Court held that Sparta was entitled to this same right.

The Crawford County Court referred the case back to the State Board of Education, directing that if Sparta met the provisions of section 293(b) of Act 299, it should be permitted to stand alone.

In the *Cambridge Springs School District* case, Judge F. Joseph Thomas also held Act 150 to be void. He directed that the plan for Crawford County submitted under Act 299 and approved by the Council of Basic Education, be reinstated.

Counsel for the State Board argues that while section 293(b) of Act 299 is mandatory on the Council of Basic Education, it is not necessarily directive as to the State Board; as appeals are allowed from the action of the Council to the State Board. Therefore, its provisions are the same as those of Act 150. The State Board has the final determination under both Acts. The provisions of the two laws are the same, except as to the Court entertaining appeals, Dauphin County Court under Act 299 and the local Court of Common Pleas under Act 150. If this is so, Act 150 is not unconstitutional. School districts have precisely the same rights under both statutes.

We do find that Act 150 is Constitutional, but we prefer not to base our decision on this argument.

The Crawford County cases hold that Act 150 contravenes the provisions of section 96 of the Statutory Construction Act of May 28, 1937, P.L. 1019, (46 P.S. 596). That section reads as follows:

> "The repeal of any civil provisions of a law shall not affect, or impair any act done, or right existing or accrued, or affect any civil suit, action or proceeding, pending to enforce any right under the authority of the law repealed.

> Such suit, action or proceeding shall and may be proceeded with and concluded under the laws in existence when such suit, action or proceeding was instituted, notwithstanding the repeal of such laws, or the same may be proceeded with and concluded under the provisions of the new law, if any, enacted."

We do not understand why this section should not be given effect. The Judges Thomas hold that Act 150 deprived the districts which had cases pending before the Dauphin County Court of the right to appeal. We reach a contrary result. Section 96 of the Statutory Construction Act *preserves* the right of appeal. Assuming that section 293(b) is mandatory, any district meeting the standards set in the section had a right to exist. If the Council of Basic Education and the State Board denied this right, then the aggrieved district had a right to appeal to the Dauphin County Court under the Statutory Construction Act. As we understand the facts, that Court dismissed appeals pending before it for practical reasons. It had so many cases it could not handle them, and dismissed them on the ground that Act 150 made them moot. The aggrieved districts had, of course, a right to appeal to the Supreme Court from the order of the Dauphin County Court.

Therefore, every district organized under Act 299 had equal rights with every other district so organized. Each could appeal or accept the provisions of Act 150. This is almost identical with Act 299. It does omit the clause contained in section 293(b) of that statute and changes the Court to which appeals lie, from Dauphin County to the Court of Common Pleas of the county wherein the aggrieved district is located.

It also by-passes the Council of Basic Education, that is, it provides that the State Board shall examine county plans in the first instance, approve or amend them, and afford hearings to districts which consider themselves aggrieved.

Viewed in this light, Act 150 does not constitute special legislation. All school districts were treated in the same manner under Act 299. If any were not satisfied with the disposition of their cases by the Council of Basic Education or the State Board under that law, they could appeal. If they waived this,

they must be held to have accepted the provisions of Act 150, which in fact is substantially the same as Act 299.

We have been referring to "rights" of school districts. This term connotes an advantage. It is, of course, debatable as to whether large or small districts provide better education for pupils. The legislature has determined that large units are preferable. It would seem that local districts are bound by that finding. If then large districts provide better education, the act of a district in remaining small is harmful to the pupils therein. It can scarcely be said that districts are, in any case, being deprived of the "right" to remain small.

There are many reasons favoring a finding of Constitutionality of any Act of the legislature, particularly one involving school districts.

Every Act of the legislature is presumed to be valid, and it will be declared invalid only for compelling reasons. In *Minsinger v. Rau,* 236 Pa. 327 (1912), the Supreme Court, in considering the 1911 Act, said:

> "The Act of May 18, 1911, P.L. 309, called the School Code, was the product of the deliberate thought of a commission of prominent citizens of the Commonwealth who worked upon the statute for several years; after prolonged consideration it passed two legislatures before final approval by the governor, and we are now asked to set it aside as unconstitutional. This we should not and cannot do unless the alleged breaches of the fundamental law are so glaring that there is no escape."

We find no glaring breaches of the fundamental law in the case at bar.

Actually, we have found no district which asserted to us that it had a right to exist as a small unit under section 293(b) of Act No. 299.

The Constitution places on the legislature the obligation of providing for the education of children up to college. The legislature has set a goal of at least 4,000 pupils per administrative unit. In section 3 of Act 299, it is stated that:

> "The purpose of this subdivision is to provide a flexible framework and effective and orderly means whereby the

administrative units of the Commonwealth's public school system can be expeditiously reorganized."

Later in the section, this clause appears:

"Local school officials, as agents of the General Assembly, are directed to continually review organizational patterns and adopt without delay all changes which will accelerate the progress of public education."

It is clear then that the legislature is in control of education. It desires larger units, and has directed that local districts co-operate with it in bringing about the desired result. Instead of doing this, the local districts are appealing to the Courts to be allowed to remain small. In *Chartiers Valley Joint Schools v. Allegheny County Board,* 418 Pa. 520 (1965), it was held that Act 299 of 1963 was Constitutional. In a concurring opinion, Mr. Justice Cohen said (p. 548):

"How is it that the school district, the creature of the Legislature, given life for the sole purpose of carrying out the Legislature's duty to provide education in the manner directed by the Legislature, can attack the Legislature's directions for discharging its duty? Certainly the Legislature has not given the school district *the duty* of making sure that the Legislature acts constitutionally. And the school district has no powers that are not either expressly conferred upon it by the Legislature or implied from the nature of its duties."

Act 150 does give to local districts the right to appeal, so we do not deny the appeals in the cases at bar on this ground. However, we believe that local boards do have a duty to co-operate with the Commonwealth.

The State has found that small units cannot provide adequate education to pupils to enable them to compete in the modern world. This thesis may be open to argument, but it is very persuasive to us. In any event, we are bound to accept the State's judgment in the matter. The mergers ordered should benefit all the pupils in the several units. We cannot believe the State would insist on a program which will be harmful to the pupils whose education is entrusted to it by our basic law.

THE ADDITIONAL TESTIMONY IN COURT

It has been argued that the Court may not receive additional testimony notwithstanding that Act No. 150 directs to the contrary. This assertion is made because the Statute requires that the adjudication of the State Board be affirmed unless the Board abused its discretion. And obviously, the Board cannot be convicted of an abuse of discretion because of testimony it never heard. There is certainly logic to this argument. However, we do not believe that this reasoning requires us to exclude testimony not produced before the Board. The only question before the Court is whether or not the Board abused its discretion; in other words, was its decision sound or arbitrary and capricious. If the latter, it must be set aside, even though the basis for this action is evidence which was not produced before it.

Also we have found in the cases heard by us, that any additional evidence produced was not of such nature as to warrant a reversal of the Board's action. Any change required, in our judgment, in the Board's adjudication was made necessary by evidence produced before the Board itself, and not by additional evidence.

THE CASE ON ITS MERITS

We will now recite the procedures followed in the case at bar and the positions taken by the three appellant school districts and by counsel for the State Board in support of its action.

Section 5 of Act 150 provides in part:

> "The Court after hearing such additional testimony as the parties may wish to present and a consideration of the entire record, shall enter an order either affirming the plan as approved by the State Board of Education, or an order making such amendments to the plan as the court in its discretion shall find necessary or advisable. The order of the Court shall be a 'final order'."

Accordingly, we will consider the record made before the State Board and the testimony produced at the Court Trial.

As required by Act 150, the State Board of Education published Standards for Approval of Administrative Units. These follow closely the mandates of the Statute and contain more extensive guidelines than are expressed in the legislation. Even these, however, are very general in tenor. For example, No. 6 reads:

> "6. An administrative unit shall be planned to include the largest feasible pupil population which assures the maximum efficiency of operation, and which justifies curricular offerings and other essential services not economically possible in smaller administrative units."

The Allegheny County Board of School Directors prepared a plan of organization of administrative units. This was transmitted to the State Board of Education by covering letter of October 7, 1968. The County Board certified that it had taken action pursuant to law in adopting the plan. It forwarded to the State Board the following documents:

1. Resolution adopted by County Board;
2. Certifications of action by County Board;
3. Administrative Unit Data Sheets (one for each unit); and
4. Maps of Units and Attendance Centers.

The three school districts involved in this appeal are contained in Administrative Unit No. 16.

The Data Sheet pertaining to the unit, as prepared by the County, indicates that there are therein, 4,110 pupils; that the population is 30,705; that the market value of property in the unit is $100,429,300.00. It covers an area of 2.64 square miles. Each district has two high schools. Rankin has one elementary school building, Braddock two, and North Braddock three. There are 349 high school students in Rankin, 730 in Braddock and 1,159 in North Braddock. In the elementary schools there are enrolled in Rankin, 407 students, in Braddock 658, and in North Braddock 1,222. The total number now enrolled in the schools is 4,525. This is 415 more than the average daily membership (A.D.M.) in the schools according to the County plan.

Each of the three districts petitioned the State Board of Education for a hearing, alleging that it was aggrieved by the proposal. The Board conducted a hearing on the matter on February 25, 1969, and on May 9th of the same year.

The testimony before the State Board developed these points.

NORTH BRADDOCK

North Braddock desire to remain alone. It is an old, well established area and possesses the capability of providing a comprehensive educational program for its pupils.

Rudolph Celigoi testifies in support of North Braddock's position. He is Assistant Superintendent of Schools of the Borough. He described the school buildings in the municipality. Thirty per cent of thir graduates go on to college or to junior college. Probably the program is slanted in favor of those who seek employment, immediately on graduation from high school. A merger will require new patterns of community loyalty. Existing buildings will not be used as efficiently as at present. Transportation will be required for pupils. This would mean added expense. Cafeterias not now in existence, will be necessary.

Robert R. Bowman also supported the Borough's position. He is Director of Guidance and Counseling. He described the work conducted in the district in his field. The area is socio-economically disadvantaged. However, with financial aid from the State and Federal Government, it can solve its own problems.

RANKIN

Counsel for Rankin stated frankly, that the district cannot continue to exist alone because of financial problems. It would, however, prefer to be merged with Swissvale rather than be in the Unit to which the State Board assigned it.

Morris Silverstein, Superintendent of Rankin Schools, described conditions in the borough. Notwithstanding the financial problem, the schools have excellent facilities and furnish a fine curriculum. It will be an asset to any unit in which

it is placed. It is a poverty area however. Six hundred and thirty-three students are from culturally deprived homes, that is, from homes where the annual income is under 3,000.00. The real estate tax is 34 mills. There should be a cafeteria in a poverty stricken school district to aid needy students to acquire proper nutrition. However, there is no such facility in Rankin. This witness suggested that the State supply the finances necessary to permit Rankin to remain as an independent administrative unit.

BRADDOCK

The position of Braddock school district is that it desires to remain as an independent unit. The County plan allows other small districts to remain alone and Braddock should be afforded the same right. The schools constitute the center of activities in the borough.

Michael O'Toole is Superintendent of Braddock Schools. He testified in support of the district's position. He described the physical plant, which is being used to 100% of its capacity. No transportation is required, except to Forbes Trail School, which is not part of the school system, but which offers technical courses to its pupils. No cafeterias are needed. The disadvantages to the proposed merger are that it will require the transportation of pupils to and from schools at added expense. Based on the number of families with annual incomes of $2,000 and less, this is the No. 1 poverty area in Allegheny County. There are 3,500 families in the municipality, and 600 of these receive public assistance. The school district, however, is very stable and meets the needs of the community. The proposed merger of the three districts would not be economically sound.

Michael J. Sullivan testified to the same effect. This is an industrial community. United States Steel contemplates additional building in the borough in the near future. The assessed property in the municipality will be sufficient to support an adequate school system.

Rev. Albert Minney and Rev. Leo G. Henry, the latter in charge of the Catholic parochial school in the area, both testified in support of Braddock's position. The clergymen are

members of a Citizen's Advisory Committee to the school board. They favor neighborhood control of the school system.

The State Board handed down its Adjudication on May 9, 1969. It held that the merged unit meets the minimum requirement of 4,000 pupils and that none of the three districts can meet this goal now or in the foreseeable future. Also, that although each district has distinctive and noteworthy programs, none has the capacity to provide a comprehensive program of quality education as envisioned as the legislative goal of Act 150.

The Board concluded that the plan will advance education in the community, and that it conforms to statutory requirements. In its discussion, the Board indicates that there are no topographical barriers to common administration, and that,

> "In this proposed unit there is afforded maximum flexibility in planning for future needs under a common administration."

This is true as to transportation, cafeteria service, educational opportunities and financing.

The testimony on appeal to this Court from the Board's ruling was heard on February 2, 1970.

Charles Belavich of Rankin, a member of its School Board, testified that because of its location and boundary lines, Rankin would be better off with Swissvale and possibly Edgewood. Rankin is in financial distress.

Dr. Charles Bair, Superintendent of County Schools, testified that he had supplied data to the Allegheny County Board for use in developing its plan, but that he had made no recommendation. He said that under Act 299 of 1963, the County plan indicated a unit composed of Braddock, North Braddock, Braddock Hills, East Pittsburgh and Rankin.

Dr. Norman Johnson testified in opposition to the plan. He is a highly educated man and is Professor of Urban Processes and Public Affairs at Carnegie-Mellon University. The gist of his testimony is that all three areas are in financial distress, and that only by combining the districts under discussion with more prosperous areas will there be any improvement in the educational facilities within the districts.

DISCUSSION

We are satisfied that the State Board acted wisely in this case. The community characteristics are the same in all three municipalities. These areas may not be considered prosperous in comparison with other sections of the County. The community is industrial and most heads of households work in the mills. Their incomes are modest, and in many cases, due probably to unemployment, inadequate for the support of a family. The unit has now a fairly high market value per A.D.M. (i.e. average daily membership in the school system). This will increase if U.S. Steel builds another plant, and the testimony indicates this will be done.

In coping with the problem of public education the legislature created the Department of Public Instruction. The State Board of Education is a Board within that department. It consists of seven members who serve as the Council of Basic Education; seven members who serve as the Council of Higher Education, and three members at large. (By Act of July 23, 1969, P.L. #74 (71 P.S. 1037) there is created a Department of Education which assumes all the functions, powers and duties of the Department of Public Instruction).

The legislature has constantly attempted to enlarge school districts. The principle that the larger the unit, the better the education appears to be well established, as is evidenced by the following quotation from the Opinion of President Judge Ervin of the Superior Court, in *State Board of Education v. Franklin Township School District,* 209 Pa. Super 410, 416:

> "For many years educators have recognized the fact that the larger the school district the more comprehensive can be the program of education offered, and attempts were made to encourage districts to consolidate or merge."

Thus, the central theme running through the legislation on the subject pertains to the enlargement of existing school districts. In fact, this appears to be the sole criterion employed by the legislature in reorganizing the districts. In arguments before us, counsel for one district (Avalon) complained that the State furnished insufficient guidelines for proposed units. The State has not set any detailed rules. It provides no specifi-

cations for buildings, teachers, cafeterias or transportation, referring to these subjects in only general terms. Apparently, it believes that if "administrative units" are enlarged, other benefits such as decreased costs per pupil, improved facilities, more efficient use of teachers, and other benefits will follow in due course of time.

We would expect that initially following a merger, the same buildings will be employed, and the children will be going to school as usual. As facilities become obsolete and as funds become available, new structures will be built. A modern school house constructed by Unit 16 will unquestionably be better than one built by any one of the three districts; and it will be available to all pupils in the Unit.

The proposed unit complies with the standards set by the State. There were 4,110 pupils therein as of the crucial time, 1967-68. The market value of property per pupil in 1966 was $24,435.00, which compares favorably with comparable figures for other units in the country. It has an area of only 2.64 square miles. The three districts are contiguous, and there are no topographical barriers which will prevent access to schools in the district.

Rankin has suggested that a unit which is composed of Rankin and Swissvale will operate more efficiently than will Unit 16 as now constituted. This, however, may be unacceptable to Swissvale. We can appreciate the difficulty which the County Board had in the first instance in preparing a plan acceptable to even a majority of pupils and parents in the County. Thiis is evident from a series of legislative enactments hereinabove listed. Also, in the case of the *Board of Education v. Franklin Townshp,* 209 Pa. Super. 410, (1967), President Judge Ervin adverts to this fact. Referring to Act No. 561 of September 12, 1961, P.L. 1283, he said (p. 417):

> "This act promptly became the subject of great public controversy, resulting in its repeal less than two years later."

The fact that reorganization is a difficult problem is further evidenced by the number of appeals filed to this Court, there being in all, 17 appeals filed involving 9 Units. In 1967,

there were 100 school reorganization appeals pending before the Dauphin County Court, to which appeals from all counties were taken under the 1963 Act. Nevertheless, the Constitution places the responsibility for education on the legislature. The legislature, we find, has acted in a reasonable manner in reducing the number of school districts in the State.

Conceivably, there are other plans which may work as well, or better, than the plan adopted by the County Board and approved by the Commonwealth. It is entirely possible that a larger unit than that presently constituted in the case at bar would be better than the unit created by the State Board. At one time, the County plan contemplated that Braddock, North Braddock, East Pittsburgh, Rankin and Turtle Creek would constitute a single unit. However, we find that Unit 16 is reasonably adapted to carry out the State's objective to improve education. We can be assured that any combination of districts which we might substitute for that established by the State would create just as much interest and opposition as did the adoption of Unit 16 by the County in the first instance.

Other arguments have been advanced by counsel for appellants herein and by counsel for appellants in other cases.

We are assured, almost uniformly by counsel for districts asserting that they are aggrieved by a merger, that the proposed plan will substantially increase the tax millage in the affected districts. This is supposition. Standards for Approval, 1968, adopted by the Department of Public Instruction negate this assumption. No. 3 reads as follows:

> "3. An administrative unit shall be planned to offer a full program of instruction, kindergarten or grade one through twelve, and provide administrative leadership, supervision and instruction at a reasonable cost consistent with the local taxable wealth and State financial support available per pupil."

And, No. 7e is:

> "e. *Use of Existing School Buildings.* An administrative unit shall utilize existing buildings to the maximum extent practical avoiding unnecessary new construction where possible."

The objective of the Commonwealth is the advancement of education and not the increase of taxes. There are deficiencies in many of the existing districts. These are freely admitted by counsel and witnesses for the districts involved. For example, in one district there is only one foreign language course offered. The Commonwealth desires two. In another, physics and chemistry are taught in alternate yaers instead of every year as prescribed by the State. A merger should mean that these shortcomings may be remedied without additional cost.

It has been urged that additional buildings will increase costs and taxes up to 100%. We believe that this fear is more imagined than real. The affairs of a merged district will be in the hands of a representative board which will raise taxes in the same manner as other elected and appointed officials. They will be subject to the wishes of the people they represent. The Standards for Approval quoted above do not contemplate increased expenditures. New buildings will be necessary, but they would have been necessary in any event. It would appear that a new building for 4,000 pupils will cost less than twice as much as two new buildings each for 2,000. In the long run, the merged units should provide better education at less expense.

Accordingly, we hold that the State Board did not abuse its discretion in approving the Allegheny County plan which established Unit 16.

THE TIME ELEMENT

Act 150 proposed this schedule:

It contains no effective date and accordingly, became effective on the date of its adoption, July 8, 1968.

County plans were to be prepared within ninety days from the effective date and to be submitted to the State Board within thirty days after date of preparation. Thus, all plans were due in Harrisburg within four months, or by November 8, 1968.

Provisions are made for hearings before the State Board and by the Court.

Section 6 of the Statute provides that on July 1, 1969, all administrative units contained in plans or organization approved by the State Board shall constitute and be decreed established as school districts.

Section 7 states that the Board of Directors of each unit (or the interim operating committee), shall divide the newly established district into either three or nine regions.

Section 9 provides that "On or before the fifteenth day of February immediately preceding the date of establishment" an interim operating committee consisting of nine incumbent school directors shall be elected, three for a term expiring on the first Monday of December, 1969, three for a term expiring on the first Monday of December, 1971, and three for a term expiring on the first Monday of December, 1973.

The establishment date contemplated by the Act, July 1, 1969, has passed, as has, of course, the fifteenth day of February immediately preceding it. Because of the delay caused by litigation, the expiration date for some members of the interim operating committee, December 1, 1969, is now meaningless.

It would not be feasible to set July 1, 1970, as the date on which units shall be considered established. We will, therefore, advance the dates set in the Statute by two years. This means that the interim operating committee will meet on or before the fifteenth day of February, 1971, and will then elect directors for terms expiring on or before the first Mondays of December, 1971, December, 1973, and December, 1975.

ORDER OF COURT

NOW, June 1 1970, on consideration of Appeal of the School District of the Borough of Rankin from Adjudication of State Board of Education approving the formation of Unit 16, testimony taken and arguments made, it is,

ORDERED AND DECREED that said Appeal be and it is here dismissed. The reorganization of school districts shall proceed on the terms stated in the foregoing opinion, and according to the applicable statutes of Pennsylvania.

.....By The Court.....

McKenna, J.

Eo die, exception noted and bill sealed.

.....McKenna, J.....

Judge

ALEXANDER
O

No. 80-1819

In the
Supreme Court of the United States

October Term 1980

SWISSVALE AREA SCHOOL DISTRICT, CHURCHILL AREA SCHOOL DISTRICT, TURTLE CREEK AREA SCHOOL DISTRICT, and EDGEWOOD SCHOOL DISTRICT,

Petitioners

v.

DOROTHY HOOTS, individually and as mother of her children JANELLE HOOTS and JAMES HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRANCE KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH AND ERIC SMITH; on behalf of themselves and all other similarly situated,

Respondents.

Brief In Opposition To The Grant Of A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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Financial Press Corporation, Pittsburgh

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STATEMENT OF THE CASE

For purposes of this Response only General Braddock Area School District,[1] hereinafter GBASD, will accept the Statement of the Case as set forth in Petitioners' Statement of the Case.

REASONS FOR DENYING THE WRIT

Since The Last Date Of The Last Order In The Appendix To The Within Petition The United States District Court For The Western District Of Pennsylvania Has Entered An Order Creating A Consolidated School District Composed Of Five Former School Districts As A Remedy In The Within Matter Based Upon Evidence Taken By The Court On April 20 And April 21, 1981, As Well As All Prior Testimony And Exhibits Presented To The Court Thereby Rendering The Issues Raised In The Said Petition Moot.

The two questions raised by Petitioners relate to the Court of Appeals determination that an Order denying relief for the eighth school year since the violation was found was appealable and directing that the district court act to determine and order the implementation of a remedy within 90 days.

On April 28, 1981, as supplemented on May 6, 1981, the United States District Court for the Western District of Pennsylvania, ordered a remedy for the *de jure* segregation it found in 1973. The remedy arrived at consisted of the consolidation of five school districts into one single district, including the within respondent, GBASD. The Court had previously, in its orders of March 5, 1981 and April 6, 1981, decided that the remedy could involve seven school districts, including the within respondent GBASD. Two school districts were removed

[1] Although not noted in the List of Parties on Page ii of the Petition, General Braddock Area School District was added as a party in 1979, being designated a Defendant-Intervenor.

from the Court's consideration of a remedy at the completion of testimony on April 21, 1981, the final remedy being the consolidation of the within respondent GBASD with the school districts of Swissvale Area School District, Churchill Area School District, Turtle Creek Area School District and Edgewood School District, Petitioners herein.

It is respectfully suggested that the within issues are now moot.

The District Court entered a final Order on April 28, 1981, as previously indicated. The Order of the United States Court of Appeals for the Third Circuit directing the District Court to make certain findings and rulings within 90 days has been complied with and the actions of the District Court in determining and ordering the implementation of remedy render the issues raised in the Petition moot.

Furthermore, the Petitioners have filed appeals to the Court of Appeals[2] from the Order of the District Court entered on April 28, 1981 and may therefore raise issues as to the merits of the remedy in these appeals.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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412/471-2644

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[2] These appeals are now pending before the United States Court of Appeals for the Third Circuit at Nos. 81-1691-1695, inclusive.

80-1819

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SWISSVALE AREA SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

DOROTHY HOOTS, *et al.*, and
COMMONWEALTH OF PENNSYLVANIA, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In a school desegregation action, filed a decade ago, where the district court had failed to order any relief after finding a constitutional violation 7 1/2 years ago:

1. Whether the court of appeals abused its discretion by ordering the district court to formulate a desegregation plan within 90 days, and the district court in fact has complied with the order.

2. Whether the district court's denial of a motion for injunctive relief for the upcoming year was appealable as the denial of an injunction pursuant to 28 U.S.C. § 1292(a)(1).

Table of Contents

	Page
Questions Presented	i
Statement	1
Reasons for Denying the Writ	6
Conclusion	10

Table of Authorities

Cases

Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969) .. 8

Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955) 9

Carter v. West Feliciana Parish School Board, 396 US. 226, 290 1969, 1970) 8

Columbus Board of Education v. Penick, 443 U.S 449 (1979) 8

Gardner v. Westinghouse Broadcasting Co., 437 US. 478 (1978) 9

Green v. County School Board, 391 U.S. 430 (1968) 8

Lee v. Marengo County Board, 588 F.2d 1134 (5th Cir.), cert. denied, 444 U.S 830 (1979) 9

Page

Milliken v. Bradley, 418 U.S 717 (1974) 3,5

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)..... 7,8

Constitutional Provisions and Statutes

Fourteenth Amendment 2

28 U.S.C. § 1292(a)(1) i,4

No. 80-441

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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SWISSVALE AREA SCHOOL DISTRICT, et al.,

Petitioners,

v.

DOROTHY HOOTS, et al., and COMMONWEALTH OF PENNSYLVANIA, et al.

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On Petition for a Writ of Certiorari to The United States Court of Appeals For The Third Circuit

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BRIEF IN OPPOSITION

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Statement

The controversy is moot.

This school desegregation action was filed on June 9, 1971 by plaintiff parents of school children attending the General

Braddock Area School district who charged that in preparing and adopting school reorganization plans for Allegheny County, Pennsylvania, the State intentionally and knowingly created racially segregated school districts. On May 15, 1973, the district court found that the State's creation of General Braddock was "an act of de jure discrimination in violation of the Fourteenth Amendment." 359 F. Supp. 807, 823 (W.D. Pa. 1973). Since 1973, no relief has been ordered despite numerous proceedings in the district court and the court of appeals (See, A. 3a, n.1).

The appeal below was taken from the district court's order of July 30, 1980 denying plaintiffs' immediate relief in the form of a merger or consolidation plan and implementation of relief by school

year 1980-81 (A. ii). The denial was stated to be "without prejudice," but, as the court of appeals found, "the effect of the denial was to preclude any possibility of granting the relief sought" (A. 13a).

On January 26, 1981, the court below vacated the July 30, 1980 order and remanded for further proceedings. The court ordered "the district court to expedite its consideration of this case so that within ninety days of the issuance of the mandate of this court it shall:

> "1) complete all hearings and necessary proceedings on the merits of the competing remedial plans for the desegregation of GBASD;
>
> "2) decide the Milliken v. Bradley[, 418 U.S. 717 (1974)] issue of which school districts may be included within an interdistrict remedy; and
>
> "3) enter an appropriate final order granting appellants the relief to which they are entitled under the district court's order of

> May 15, 1973, such relief to be effective and implemented by the beginning of the first semester of the school year in the fall of 1981."

(A. 16a).*/

The mandate was issued January 26, 1981. A petition for rehearing was filed by four of the eight defendant school districts (Churchill, Edgewood, Swissvale and Turtle Creek), and denied February 25th (A. 54a). A motion for a stay was denied by the Third Circuit on March 13th and by Justice Brennan, as Circuit Justice, on March 24th.

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*/ The court below was unanimous on the appealability of the order as a denial of an injunction, 28 U.S.C. § 1292(a), and on the need for expedited relief. Judge Garth agreed that the court had jurisdiction and that "this protracted litigation should be completed as speedily as possible and thus should be accorded the very highest priority" (A. 32a), but dissented on the need for the 90 day deadline (A. 34a).

Upon the issuance of the mandate, the district determined the remedy (A. 75a). On March 5, 1981, the court resolved the Milliken v. Bradley, supra, issue and held that the surrounding Churchill, Turtle Creek, Swissvale, East Allegheny, Edgewood, and Gateway districts may be included in any remedy (A. 58a). On April 6, 1981, the court rejected plans that would merely upgrade the facilities of the General Braddock, and that would provide for the closing of General Braddock schools and the education of children in surrounding districts, as ineffective and infeasible. On April 28th, the court determined that the present school districts of Churchill, Edgewood, Swissvale, General Braddock, and Turtle Creek should be consolidated, and issued a final order with guidelines for a desegregation plan to be implemented fall 1981. Thus

the district court has complied with the mandate.*/

The instant petition for a writ of certiorari by the Churchill, Edgewood, Turtle Creek and Swissvale school districts to review the January 26, 1981 Third Circuit opinion is filed at the end of the 90 day period of hearings and orders mandated by the court of appeals and complied with by the district court. State defendants do not seek review.

REASONS FOR DENYING THE WRIT

The opinion below presents no important questions, and is entirely consistent with the opinions of this Court and other courts of appeals. The issues presented are moot.

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*/ A separate appeal has been filed by the four districts from the April 28th order, which is not before the Court. That appeal is pending in the Third Circuit.

1. The mandate of the court of appeals has been dutifully complied with by the district court within the 90 day period. Remedial hearings have been held, and the appropriate orders issued. The controversy is moot. There is no need for review.

2. The mandate of the Third Circuit, in any event, was well within the "breadth and flexibility ... inherent in equitable remedies" in school desegregation litigation. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S 1, 15 (1971). The Court of Appeals had acquired substantial experience with the litigation over the course of five appeals or writs for mandamus (See, A. 3a, n.1).

The 90 day deadline was plainly consistent with the constitutional duty to

desegregate "now," Columbus Board of Education v. Penick, 443 U.S. 449, 459 (1979), quoting Swann, supra, 402 U.S. at 13 and Green v. County School Board, 391 U.S. 430, 439 (1968), "forthwith," Swann, supra, 402 U.S at 14, "immediately," Alexander v. Holmes County Board of Education, 396 U.S 19, 20 (1969), and "at once." Alexander, supra; see Carter v. West Feliciana Parish School Board, 396 U.S. 226, 290 (1969, 1970).*/

3. The unanimous opinion of the court below was correct that the district court's denial in July 1980 of injunctive

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*/ In Alexander, the Court vacated Fifth Circuit orders postponing desegregation in the then-current school year on October 29, 1969. Subsequently, on Janaury 14, 1970, the Court vacated Fifth Circuit orders requiring adoption of plans by midyear but postponing pupil desegregation until the 1970-71 school year in Carter, supra, 396 U.S. at 291. Carter required immediate midyear pupil desegregation.

relief effective school year 1980-81 was an "'interlocutory order[ ] of serious, perhaps irreparable consequence.'" Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480 (1978), quoting Baltimore Contractors Inc. v. Bodinger, 348 U.S. 176, 181 (1955). The appealability of the order denying injunctive relief in a school desegregation action is neither unusual or remarkable. See, e.g., Lee v. Marengo County Board., 588 F.2d 1134, 1136 (5th Cir.), cert. denied, 444 U.S. 830 (1979).

CONCLUSION

This petition for a writ of certiorari should be denied.

Respectfully submitted,

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